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*HINDU JURISPRUDENCE—A STUDY.

The subject that I propose to discourse upon to-day is "Hindu Jurisprudence—A Study." My object in taking up this subject is to show how advanced is the system of jurisprudence as disclosed in our law books. It would be seen by a comparison of that system with other systems of law (such as the English and the Roman) how developed the legal ideas and institutions of the Hindu law were. The study of our sacred books, besides affording us a pleasure of its own, is valuable as giving us an insight into the true nature and character of our institutions and as enabling us to enter into the spirit of the reasons and ideals which actuated and guided our law-givers in shaping the institutions as we now find them.

It is pleasant and gratifying to know that we belong to the land of exalted primæval wisdom; but the consciousness of a past greatness can of itself be no sign of the progress of a nation in the present. The consciousness that our ancestors were great and that they were guided by high ideals and realised their greatness by working out these ideals would help us in maintaining our former prestige only when we should also be actuated by such high ideals. Modern education in our English schools not merely leaves a blank in respect of our past, but produces in most of our minds a contempt for our ancient institutions without any real acquaintance with them. It is a matter for great regret that the study of our sacred books should almost be completely neglected, not merely by the outside lay public, but also by most of us to whom such a study ought to possess a special interest and a special value. The

*An address delivered at the Vakils' gathering of this year by Mr. P. R Ganapathy Aiyar, B.A., B.L.

limits of time necessarily confine me to a consideration of only a few topics of Hindu law ; but my object will be more than realised if this paper contributes in ever so small a measure to stimulate inquiry into our Hindu law and our system of jurisprudence.

In the law of status, the chief topic one has to deal with is that of marriage. The Vedas disclose to us that marriage was a settled institution among the Aryan society from a period long anterior thereto. Wives (Patnis) are frequently spoken of, and marriages also referred to in the Vedas[1]. The well-known legend of Swethakethu, referred to in the Mahabaratha, would seem to point out that the institution of marriage originated with him and that he put a stop to the promiscuous intercourse which existed previously to his time. But even this legend cannot be said to militate against the view that the institution of marriage became definitely established at a very ancient period of Aryan history.

No doubt several forms of marriage were referred to both by the Smriti writers and the Hindu commentators or the Nibhandha writers. I need hardly repeat these forms of marriage to you. A few of these forms cannot have the pretence of any claim to be styled as marriages, and hence some adverse criticism is made against some of our ancient writers for recognising or bringing them under the category of marriage. It is, however, a mistake to suppose that the writers of our law books in any

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1. Rigveda Samhitha Ashtaka VI, Mand. 8, Adh. 2, Varga 38 Suk- 5, p. 172.
,, Ibid Bdh. 4, Varga 6, Suk. 33, p. 289.
,, Ibid Ast. VII, Mand. 10 Ast. 6, Varga 27 Suk. 7, p. 435.
,, Ibid Adh. VII, Varga 17, Suk. 12, p. 484, 485.
Ashtaka VIII Mand. 10, Adh 3, Varg. 21 Suk. 6 p. 218.
,, Ibid ,, Suk. 9 p, 220.
,, Ibid Varg. 22, Suk. 11, p. 221.
,, Ibid 22, Suk. 13, p. 222.
Suk. 23, p. 227.
,, Ibid Varg. 24, Suk. 25, p. 228.
,, Ibid Varg. 27. Suk. 36, p. 233.
,, Ibid Suk. 38, p. 234.
,, Ibid Varg. 28, Suk. 42, p. 235.
,, Ibid Varg. 28, Suk. 44, p. 236.
,, Ibid Varg. 28, Suk. 46, 47 p. 237.

way recognised them[1] as valid forms of marriage. In the march of Aryan conquest and civilisation the Aryans necessarily came into contact with indigenous tribes with little or no civilisation or with varying degrees of civilisation, and some of these tribes might have recognised a system of marriage by capture, which, as modern researches show, prevailed among some ancient societies of the East and the West, and which still prevails among some hill tribes in India[2]. Apart from these tribes, who generally became amalgamated into the Aryan society as Sudras[3], there were even among the Aryans certain classes described by the Vedas as Aryan enemies whose practices were depraved and who therefore had no communion with the Aryans proper upon whom blessings were invoked in the Vedic hymns[4]. Our sages, in referring to these practices, could not be said to have recognised them; on the other hand even those who could be said to have been the earliest in referring to these forms stigmatised them in no uncertain terms and by holding up certain forms as approved materially contributed to the silent and gradual extinction of these practices among such societies[5].

1. See the discussion in Note 5. It will be seen that some of the forms correspond to the forms prevalent in the early Roman Law. The Hindu Law of Marriage, as the Roman Law of Marriage, presupposes two earlier forms, *viz.*, marriage by purchase or by capture which are apparently common to most societies. Cf. Sohm's Institutes of Roman Law, p. 361, foot note 3.

2. See Lyall's Asiatic studies First series pp. 179 180. Cf. Maclennan on 'Primitive Marriage.'

3. Cf. Baudhayana who says that "the Paisacha form is lawful for Sudras; because Sudras are not particular about their wives". See Baudhayana Pr. I, Ad. 11, K. 20, v. 14 Vol. XIV S.B.E. p. 207. See also Apastamba Pr. I, Pat. 9, Kh. 27 v. 10 (Vol. II, S.B.E. 87) where he says: "He who co-habits with a non-Aryan woman, he who lends money at interest, he who drinks (other) spirituous liquors (than sura), he who praises everybody in a manner unworthy of a Brahmana, shall sit on grass, allowing his back to be scorched (by the sun). So in Gautama Ch. VI § 11 (Vol. 2 p. 209) it is said: (And) an Arya, though (he be) younger, by a Sudra where a distinction is made between Aryans and Sudras." In Ch. XII § 1 and 2 the same author distinguishes between Aryans and Sudras. "A Sudra who intentionally reviles twice born men by criminal abuse, or criminally assaults them with blows, shall be deprived of the limb with which he offends. If he has criminal intercourse with an Aryan woman, his organ shall be cut off, and all his property be confiscated."

4. See Muir's Ancient Sanskrit Texts Part II Chapter 3 pp. 383 and 400 and compare Baudha-yana Pr. I, Ad. 11, K. 20, v. 13 and 14, (Vol. 14, S. B. E. p. 207).

5. It will be interesting to note the several stages indicating the gradual extinction of some of the baser forms.

Some may think that Hindu sages inculcated marriage as obligatory upon Hindus ; at any rate, upon the three regenerate

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There is a class of writers who refer to all the eight forms simply without indicating any preference. Thus Yagnavalkya refers to the 8 forms and, unlike Manu, does not indicate expressly what in his opinion are the forms to be preferred. But even he, by referring to the benefits acquired by the resultant offspring of such marriages, must be impliedly held to have indicated only 4 forms as preferable. Thus Yagnavalkya (Dutt, pp. 10 and 11, vs. 58 to 61.) 58. "That is called a Brahma marriage where a maiden, adorned according to one's own power, is given away to (a bridegroom) on being invited. A son, begotten of such (a marriage), sanctifies twenty-one generations. 59. That is called a Daiva (marriage) in which, a maiden is given to a ritwija (priest), engaged in a sacrifice. [A marriage that is celebrated (after) taking a pair of cows is (called) Arsha. A son born of the former, sanctifies fourteen generations and that of the latter, six. 60. [A marriage in which a maiden] is given to a soliciting [person] after saying [practice religion with her]; is called Kayah. [A son] begotten of [such a marriage,] sanctifies six generations [upwards] and six generations (downwards) together with the soul [of the begotten]. 61. Asura [marriage is that in which] money is taken [in exchange for the bride]; Gandharva [marriage is that in which the parties] unite themselves by a vow of mutual love ; a Rakshasa marriage [is that in which the maiden]-is carried away by fighing ; [and] a Paisacha marriage [is that in which] a maiden [is taken away] stealthily [while asleep or by stratagem]."

Again Manu in giving the 8 forms refers to the conflict of opinion. Manu Chapter III, vs. 20 to 26. 20. "Now learn compendiously the eight forms of the nuptial ceremony, used by the four classes, some good and some bad in this world, and in the next. 21. The ceremony of Brahma, of the Devas, of the Rishis, of the Prajapatis. of the Asuras, of the Ghandharvas, and of the Rakshasas ; the eighth and basest is that of the Paisachas. 22. Which of them is permitted by law to each class and what are the good and bad properties of each ceremony ; all this I will fully declare to you, together with the qualities, good and bad, of the offspring. 23. Let mankind know that *the* six *first* in direct order are by some held valid in the case of a priest ; the four last in that of a warrior ; and the same four, except the Rakhasa marriage,' in the cases of a merchant and a man of the servile class. 24. Some consider the four first only as approved in the case of a priest ; one, that of Rakshasas, as peculiar to a soldier ; and that of Asuras to a mercantile and servile man. 25. But in this code, three of the five last are held legal and two illegal ; the ceremonies of Pisachas and Asuras must never be performed. 26. For a military man the before mentioned marriages of Ghandharvas and Rakshas, as whether separate or mixed, *as when a girl is made captive by her lover, after a victory over her kinsmen*, are permitted by law. 34. When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage, called Paisacha, is the eighth and the basest. 35. The gift of daughters in marriage by the sacerdotal class, is most approved, when they *previously* have poured water *into the hands of the bridegroom* ; but the ceremonies of other classes may be performed according to their several fancies. 39. By four marriages, the Brahma and so forth, in direct order, are born sons illumined by the Veda, learned men, beloved by the learned. 40. Adorned with beauty, and with the quality of goodness, wealth, fame, amply gratified with lawful enjoyments, per-

classes especially. The fact that marriage is one of the ten Samskarams, mentioned by the Hindu sages as essential for the

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forming all duties, and living a hundred years. 41. But in the other four marriages, which remain, are produced sons acting cruelly, speaking falsely, abhorring the Veda and the duties prescribed in it. 42. From the blameless nuptial rites of men spring a blameless progeny; from the reprehensible a reprehensible offspring: let mankind, therefore, studiously avoid the culpable forms *of marriage*. 54. When money or goods are given to damsels, whose kinsmen receive them not for thier own use, it is no sale: it is merely a token of courtesy and affection to the brides. Sankha refers to the 8 forms and declares four [Brahma, Daiva, Arsha and Prajapathya] as commendable for Brahmins while Gandharva and Rakshasa are commendable for the Kshatriyas." Sankha says Ch. IV, vs. 2 to 6, (Dutt p. 616 "2. The eight forms of marriages (recognized by our *Dharma Sastras*) are the Brahma, Daiva, Arsha, Prajapatya, Asura, Ghandharva, Rakshasa and Paisacha. 3. Of these the first four forms of marriage are commendable in respect of Brahmanas; the Gandharva and Rakshasa forms are commendable in respect of Kahatriyas".

Gautama, referring to the 8 forms, represents the stage when opinion was unanimous as regards two of the forms, Rakshasa and Paisacha, while it was halting as regards the Ghandharva and Asura. In Ch. IV, v. 14, see S.B.E., Vol. II, p. 197, he states his own opinion, *viz.* that the first four rites *viz*, Brahma, Prajapathya, Arsha and Daiva are lawful. In Ch. IV, V, 15 he gives the opinion of others, some say the first six. This will include the Ghandharva and Asura.

Baudhayna represents a stage earlier than that represented by Gautama when he states that the four first are lawful for a Brahmana, and that, of the last four, each succeeding one is more sinful. There must have been some fluctuating opinion in the society in which he lived as would be seen from his stating that some among these last forms were lawful for particular classes (there being vestiges of these still prevailing among these castes). In order that his view might prevail, the system of purchase was stigmatized in no uncertain terms and the authorities quoted. Thus Baudhayana inPrasna II, Adhyaya XI, K. 21, verses 1 to 3 S. B. E. Vol. 14 p. 1 declares. "The Veda declares the quality of the offspring depends on the quality of the marriage-rite. 2. Now they quote also (the following verses): 'It is declared that a female who has been purchased for money is not a wife. She cannot (assist) at sacrifices offered to the gods or the manes. Kasyapa has stated that she is a slave.' 3. Those wicked men who, seduced by greed, give away a daughter for a fee, who (thus) sell themselves and commit a great crime, fall (after death) into a dreadful place of punishment and destroy their family down to the seventh (generation). Moreover, they will repeatedly die and be born again. All (this) is declared (to happen), if a fee (is taken)" "Indeed the system of purchase has been stigmatized from the days of Manu. Manu, Chapter IX, § 98, 100 98. But even a man of the servile class ought not to receive a gratuity, when he gives his daughter in marriage; since a father who takes a fee *on that occasion* tacitly sells his daughter. 100. Nor even in former creations, have we heard the *virtuous approve* the tacit sale of a daughter for a price, under the name of a nuptial gratuity." See also Atri, V. 380, (Dutt, p. 380.) "A maiden who is bought, should never be taken as a wife; the sons begotten on her, are not qualified to offer funeral cakes to their departed manes."

regeneration of the Dwijas and the only one prescribed for women and Sudras, may lend colour to this view. The object of the sages in mentioning it as one of the Samskarams is only to hold out to the people a high ideal which, if realised, would be conducive to the well-being and progress of the society[1]. According to the French philosophers marriage renders men

Vishnu refers to eight forms, Chapter XXIV, § 17 to 26, S. B. E. Vol. p, and declares that the four first, *viz.*, Brahma, Arsha, Daiva and Prajapathya are legitimate for a Brahmana and Gandharva for a Kshatriya, § 27 and 28.

Thirdly there is a class of writers who do not refer to the worst forms at all; but only refer to the six forms and declare that even among these some are approved and the ohers unapproved.

Apasthamba and Vasishta refer only to 6 forms *viz*, Brahma, Arsha, Daiva Gandharva, Asura and Rakhasa Vasishta refers to Rakshasa as Kshetra and Asura as Manusha. Apasthamba declares that the first three among these, *viz.*, Brahma, Arsha and Daiva are praiseworthy ; each preceding one better than the following. It may be useful to add that this writer holds most advanced views on the question of marriage and declares that the gift and sale or purchase are not recognised and that these words are used only metaphorically. Apastamba, Prasna II, Patala 6, Khanda 13, § 11 and 12 (metaphorical sale). S. B. E. Vol. II, pp. 132, 133. " 11. The gift (or acceptance of a child) and the right to sell (or buy) a child are not recognised. 12. It is declared in the Veda that at the time of marriage a gift, for (the fulfilment of) his wishes, should be made (by the bridegroom) to the father of the bride, in order to fulfil the law. 'Therefore he should give a hundred (cows) besides a chariot ; that (gift) he should make bootless (by returning it to the giver)' In reference to those (marriage rites), the word 'sale' (which occurs in some smritis is only used as) a metaphorical expression ; for the union (of the husband and wife) is effected through the law."

There is lastly a class of writers who refer only to the Brahma (though they cannot be said to be not cognizant of the others) and extol the merits accruing from adopting such a form. Thus Harita says: "That foremost of the twice-born must do so according to the most excellent rite of Brahma. Various other forms of marriage, according to caste and order, have been spoken of." (Dutt p. 173). Samvarta is more positive: Dutt p. 340 § 61 to 64. " He who, decorating a maiden with ornaments, gives her unto a becoming bridegroom, according to the Brahma mode of marriage, enjoys extraordinary prosperity by the virtue of the giving away of the maiden, acquires the applause of the pious, and attains to un-ending fame. (61-62). Having given away (a maiden), sanctified with Homa Mantrams, a person attains fruits of hundreds of Jotisthoma Sacrifice (63). Having given away a maiden-daughter, decorated with ornaments, clothes and seats, a father attains to the celestial region and is adored of the suras (celestials)."

1. There are several texts extolling the order of the house-holder. Thus Harita in Ch. IV, v. 75 to 77. (Dutt, p. 181) Says: 75 "This is the essence of the duties of a house-holder described (by me), He who satisfies them with reverence, attains to the dignity of *Brahma*. § 76. By the favor of the man-lion, he acquires the most excellent knowledge. And, by it, a *Brahmana* attains emancipation, O ye twice born ones. § 77. *O Ye Vipras*, thus the eternal Code of duties has been described in brief by me to you. If a house-holder carefully performs the duties laid down for the domestic.

more virtuous and more wise, and keeps down crimes. Perhaps, our sages were influenced by some such considerations. It is, however, clear that the sages never intended to make marriage compulsory[1], and all they were anxious about was to see that men

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mode of life, he becomes united with (the God) Hari." So also Vasishta Ch. VIII § 14 to 16. (S. B. E. Vol. 14 p. 44). 14. "A house-holder alone performs sacrifices, a house-holder alone performs austerities, and (therefore) the order of householders is the most distinguished among the four. 15. As all rivers, both great and small, find a resting place in the ocean, even so men of all orders find protection with house-holders. 16. As all creatures exist through the protection afforded by their mothers, even so all mendicants subsist through the protection afforded by house-holders." In the note to Apasthamba Pr. II. Pat. 9, K. 21 § 8, (S. B. E. Vol. II. p. 153) the Editor says: "The meaning of the Sutra is, that the studentship is a necessary preliminary for the Sanyasin. If a man considers himself sufficiently purified by his life in that order, he may become a Sanyasin immediately after its completion. Otherwise he may first become a householder, or a hermit, and enter the last order when his passions are entirely extinct." The following further passages in Apasthamba Prasna 2 Patala 9. K. 21 v. 1, 2, 6, 8, 19 S. B. E. Vol. 2 p. 153 confirm this view.

"There are four orders, *viz.*, the order of house-holders, the order of students, the order of ascetics, and the order of hermits in the world. 2. If he lives in all these four according to the rules (of the law), without allowing himself to be disturbed (by anything), he will obtain salvation. 6. Worshipping until death (and living) according to the rule of a (temporary student), a (professed) student may leave his body in the house of his teacher. 8. Only after (having fulfilled) the duties of that (order of students) he shall go forth (as an ascetic) remaining chaste. 19. Only after (completing) that (studentship) he shall go forth, remaining chaste."

"Again in Pr. II, Part 9, K. 23 v. 4 and 5.' (Vol. II, S. B. E. p. 158). the same writer says: "Those eighty thousand sages who desired offspring passed to the South by Aryaman's road and obtained burial grounds. 5. Those eighty thousand sages who desired no offspring passed by Aryaman's road to the North and obtained immortality." Gautama Chapter 3 § 3. (Vol. II S. B. E. p. 193) thus extols this order: "The house-holder is the source of these, because the others do not produce offspring."

1. ** Indeed it would appear that the ancient law contemplated the existence of women without marriage although the modern commentators would refer that as applicable to a former Kalpa. Thus the author of Parasara Madhaviya cites a text of Harita in support of this view 1 M. L. J. p. 579 "Women are of two kinds—those who discourse on Brahma and those who become brides at once. Of them, to those who discourse on Brahma are ordained, *Upanayanam*, kindling the (sacred) fire, and by giving for alms in their own house.' And as to those who become brides at once, their marriage should be performed, after somehow getting through the *Upanayanam* alone where the time for marriage is come."

See Vasishta, Ch. VII§ 3, S. B. E. Vol. 14, p. 40.; *Baudhayana*, Pr. II) Ad. 10, Kan. 17 § 2-6 S. B. E. vol 14 pp. 273, 274. *Gautama* Ch. III § 1. S.B.E Vol. 2 p, 192.

were in one of the four orders prescribed by them[1]. Each order is praised in its turn by the sages, and seeing that the generality of people is comprised of ordinary men whose minds are not highly developed the passing from one order to the other until the fourth order is reached indicates the gradual process of evolution of which alone such minds are naturally capable[8]. But to minds more highly developed the successive entries into these several orders are not necessary, and the sages state that a person may at once accept such order as befits his state of mental development.[2] He may be a perpetual student.[3]

According to Hindu law marriage is not a mere civil contract but a religious ceremony. It is a Samskaram or sacrament[4] and creates a religious tie which is indissoluble. As observed by Mr. Justice Muthuswami Iyer in *Venkatacharyalu* v. *Rangacharyalu*[5]:—"There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a Samskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of

1. Daksha Ch. I § 10 and 12. Dutt (p. 434.) "A twice born person should not live, even for a day, without following any order. If he lives without following any order, he is required to perform a penitential rite. § 12. The three orders should be followed in due succession and not in a reverse course. There is none more sinful than he who follows them in a reverse."

2. Katyayana states that if a person does not get a maiden by solicitation he may adopt the next order. *Vide* Katyayana Chapter VI § 15; (Dutt p. 369) See also: Vasishta and Baudhayana cited in note 1 to p. 231 supra.

3. Yagnavalkya in Ch. I vs. 49 and 50. says: "Thus a perpetual religious student [who vows a life of long abstinence and celibacy] should [for ever] live near his preceptor; in his absence, (near) his son; in the latter's absence, (near) his wife; [and in his absence] near the sacred fire. By such a method [a religious student] who has controlled his senses, after renouncing his body, attains to the region of Brahma; he is not born again in this world. Usanas in Chapter III § 83 and 84. (Dutt p. 212) says. If a twice born person wishes to lead the life of a perpetual religious student at the house of his preceptor, he should serve him diligently and assiduously till the destruction of his body. § 84. Or. (*i.e.*, in the absence of his preceptor), going to a forest he should duly offer oblations to fire. And being self-restrained, he should ever and anon study the spiritual science." See also Daksha Ch. I v. 8. (Dutt p. 434). "Two classes of *Brahmacharin* have been mentioned by the wise in the *Smriti*. The first is *Upakusvanaka* (a Brahmana, in a state of pupilage who wishes to pass on to the state of a house-holder); the second is *Naishthika* (one who leads a life of perpetual celibacy)."

4. This Sacredness seems to have been established even at a period anterior to the Vedas

5. (1891) I. L. R. 14 Mad. 316.

the soul. It is binding for life because the marriage rite completed by Saptapadi or the walking of the seven steps before the consecrated fire creates a religious tie, and a religious tie when once created cannot be untied." This view of the nature of marriage is supported by our sacred books in law[1].

It must, however, be remembered that although Hindu law regards marriage as a sacrament and the status is created by the performance of certain rites it cannot be arrived at without a previous agreement. In other words it is necessary that there should be a previous agreement in order that the relationship may arise[2]. When there is such an agreement and the necessary

1. Hence it is that marriage pre-eminently belongs to the law of status as Apastamba declares that the union of husband and wife is declared by law. This author says in Pr. II, Part 6, K. 13 § 12, S. B. E. Vol. 2, p. 133. "It is declared in the Veda that at the time of marriage a gift, for (the fulfilment of) his wishes, should be made (by the bridegroom) to the father of the bride, in order to fulfil the law. Therefore he should give a hundred (cows) besides a chariot; that gift he should make bootless (by returning it to the giver). In reference to those (marriage rites), the word 'sale' (which occurs in some Smritis) is only used as a metaphorical expression; for the union (of the husband and wife) is effected through the law."

2. Early English writers on Hindu Law, at any rate the most learned of them, took this view. In Sir Thomas Strange on *Hindu Law* (1825 Edn.) p. 269 it is stated: The Compiler (of the Digest) has included with a large portion of irrelevant matter, some, not in general classed under this title; as, for instance, not only marriage........That marriage is a contract and that the courts are bound to administer to parties the law of their faith under this head, is unquestionable."

The question of agreement has to be considered under two aspects; first the agreement between the father of the bride or those representing him and the father of the bridegroom, the bridegroom, or those representing him; and secondly, the direct agreement between the bridegroom and the bride or the parties.

According to the Hindu notions, courtship in the English or Western sense of the term is absent. But it is just as untrue to say that a marriage can be completed without the consent or in spite of the dissent of the bride or the bridegroom as it will be incorrect to say that marriages are not settled for Hindu boys and girls by others, viz., parents who are as concerned as the parties in the English sense of the term in selecting proper matches. Whatever may be said from a layman's point of view, it cannot be denied that in true legal analysis the consent of the bridegroom and the bride are essentially involved in a marriage according to Hindu Law.

First, as regards the agreement between the father of the bride, &c. There is first the preliminary stage. Persons are sent to find out a proper

rites are performed then there is a valid marriage. Thus Vasishta

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match on the part of the bridegroom's father or the bridegroom (*i.e.*, the strict view according to our sacred books). Of course during these days of Western education, where an artificial market has been created for an English educated boy and where the difficulty is for the girls or their fathers to find out proper matches, the position is reversed, and it is only the bride's party that is sent on the wooing march. Whichever view may be taken, there is first an agreement between the bride's father and the bridegroom's father. This stage has necessarily to pass in order that there may be a marriage. This will appear from Sankhyayana's Grihya Sutra, Adh I, Kh. 6 § 1 to 5, S.B.E. Vol. 29, p 21 : "1. If he will acquire a wife, let him recite over the wooers (whom he sends to the girl's father) when they go away, the verse, 'Thornless' (See Rigveda X, 85, 23) 2. When they arrive, they take flowers, &c. 3. They say thrice 'Here I am, sir.' 4. When these words have been uttered, they ask the girl in marriage, reciting the clan names, the dwellers turning their faces to the East, the visitors to the West. 5. When the matter pleases both sides let them touch a full vessel into which have been put flowers, etc., and let them recite the formula, &c." See also Apastamba Grihya Sutra, Pat. I, S. 2, § 16 and Pat. II, S. 4 § 1. S.B.E. Vol. 30, pp. 255 and 258.

The betrothal of Hindu Law or the Vagdanam, as it is called, is the agreement stated here. It is not an essential of the marriage in the sense that it does not fix the marriage tie. Indeed in some of the forms which are recognised as valid it will be difficult to find the existence of this agreement.

Secondly, as regards the agreement between the bridegroom and the bride or the consent of the parties. If we take the ceremonies which are regarded as essential for the validity of the marriage (and it is only by a reference to these ceremonies that we shall be justified in arriving at the views of our law-givers) the only reasonable conclusion that can be come to is that without the consent of the bridegroom and of the bride who are the only persons entitled to take part in those ceremonies excepting in one particular, to be presently mentioned, no marriage rites can be performed. They are the chief actors, and the ceremonies which are required to be performed cannot be performed without their consent. Even if there was nothing more to be said upon this question there would be ample justification for the view that without the consent of the bridegroom or the bride (and agreement involves such consent) no marriage could be completed. In fact it will be surprising to our law-givers to be told that there could be a marriage without the consent of the bride. The exception refered to is with reference to the ceremony indicating the gift by the father, rand, so far as one can see, this ceremony is the survival of the archaic notion of *patria potestas* and is really not necessary for the completion of a valid marriage. In fact the sages expressly recognise that the gift contemplated in those ceremonies is not a real one but only a fictitious one. See Apasthamba, Prasna II, Patala 6. K. 13, § 11 and 12 S. B. E. Vol. 2 pp 132, 133.

In verse 11 Abastamba declares that the gift and purchase of a child (अपत्य.) are not recognised, and that the use of these terms in some smritis is only metaphorical. (संस्तुतिमात्रं). This does not refer simply to adoptions. It refers to any gift and purchase. That is made clear in v. 12 below. "The union of husband and wife is effected through the law" (धर्मादिसंबन्धः) The gift referred to is only a part of the ceremonial law. It is necessary in order that the wife may cease to belong to the gotra of her father and may take the gotra of her husband. Otherwise it is not necessary at all. The statement in Manu, Ch. V § 152 S. B. E. Vol. 25 p. 195, that the gift is the cause of the husband's dominion represents the archaic doctrine. Even in Manu's time it must be taken to be archaic as there are other passages in Manu which shew that the relationship of husband and wife is not created by the gift but only by the performance of the ceremonies ending with the seventh step. See Manu, Ch. VIII, § 227, S.B.E., Vol. 25, p. 295. The Gandharva form of marriage is one recognised by law. If, according to the Hindu Law, the consent of the immediate parties (*viz.*, the bridegroom and the bride) is not necessary and marriage can only be effected by a gift by the father of the bride without reference to the consent of the bride, the recognition by the Hindu Law of the Gandharva form of marriage is quite out of place. If, on the other hand, the consent of the bride and bridegroom is a thing necessary and taken for granted in all these praiseworthy forms of marriage, the distinction between the Gandharva and Brahma (and the other three praiseworthy forms of marriage) becomes quite natural. In fact the expression Kanyadanam in Sanskrit books on law is used more or less technically as the marriage of a maiden although literally it may mean the gift of a maiden. For even with respect to the Gandharva form, Kanyadanam is spoken of as resulting either from mutual desire or by word of mouth. See Kulluka's Commentary on Manu Ch, III, § 35. In the Gandharva form there is no gift by the father of the bride as in the case of the Brahma and other forms. In consequence the bride does not change the gotra of the father. Thus the author of the Parasara Madhaviya cites the following text: "A woman becomes one with her husband in *pinda*, *gotra*, and *sutaka* (pollution); so she loses her (father's) *gotra* on marriage at the seventh step" [see the Madras Law Journal Reprint p. 349=old M. L. J. p. 448 Vol. I.] and adds: "Not so for in the forms of marriage beginning with *Gandharva* as there is no gift of the maiden, the *gotra* and *pinda* of the father do not cease." For this he cites the text:—"The funeral cake and water should be offered as belonging to the husband's *gotra*, in the case of a maiden married in the forms beginning with the *Brahma* and as belonging to her father's *gotra* in the case of one married in the forms beginning with the *Gandharva* by one acquainted with the ceremonial law." [Markandeya Purana, Ch. II, § 21 and 22, cited in Parasara Madhaviya and quoted in the Reprint of the Madras Law Journal, Vol. I, p. 349=old M. L. J., Vol. I.p. 448.] That the gift by the father relates only to the ceremonial law and is not essential to the validity of a marriage will appear from the fact that the bride is allowed to give herself away under certain circumstances,

Yagnavalkya says in the absence of her givers the maiden may chose an eligible husband for herself-Ch. I §. 64. So other writers state that in case the father and other relations fail to give the maiden after the appearance of menses the maiden may wait for three menses (according to others three years) and afterwards may give herself away in marriage. The order of persons entitled to give in marriage is stated by Yagnavalkya in v. 163 and this clearly relates to this ceremonial law of gfts. It is satisfactory to note that a Bench of the Madras High Court (*Benson* and *Sundar Aiyar* JJ.) in a recent case took exactly the same view of Yagnavalkya's text. See *Ranganaikammal* v. *Ramanuja Aiyangar* (1911) 21 M.L.J.R. 600. Apart from this there are various instances mentioned in the books of maidens selecting their own husbands. The practice of Svayamvara clearly implies that the consent of the bride and that of the bridegroom is necessarily involved in the legal elements of marriage according to Hindu Law. This together with the performance of the ceremonies would be enough to constitute a valid marriage according to some forms as even the Gandharva form was incomplete without the performance of some ceremonies. This is clear from the Parasara Madhaviya, the author of which relies upon a text of Devala and a text of Grihya Parisishta—see Vol. I. old M.L.J. p. 641. and Reprint of M. L. J. Vol. I. p. 503. See also *Brindhavana v. Radhamani* (1888) I. L. R. 12 M. 72. All that the Hindu law-givers stated was that if to the above two requisites there should be superadded a free gift by the father of the bride to a suitor that form of marriage would according to them be the most superior one. There is not the least intention on their part to state that the gift alone without the consent of the bride would be a valid form. Indeed it would be impossible to perform the marriages without such consent, and, as we have already said, the ceremonies which a bride has to undergo according to our law-givers presupposes her consent and could not be performed if she dissents. It may be a question whether, looking at the text and the ceremonies prescribed by the law-givers, the bride should not have attained puberty or discretion sufficient to enter into contracts or to know the consequences of her relationship, This, however, is beside our present question.

The position here stated may be compared to the different stages of development which the law of marriage underwent in the Roman-Dutch Law. "According to the ancient German custom a woman was always in the *mundium* of some male person. By *mundium* was understood the protection and representation granted to persons who are socially and physically weak—that is to say, all those who are incapable of bearing arms." * * * *

"The woman came within the legal sphere of the head of the family. He was bound to protect her, and the relatives had an obligation to see that he did so. On the other hand, she could not arbitrarily withdraw herself from this protection nor be withdrawn from it without his consent. His guardianship entitled him to act as her agent and as such to enter into contracts on her behalf. The man who wanted her for his wife had to negotiate with the head of the family and to enter into a contract of purchase and sale, as to which the male relatives of the woman were consulted. By purchasing her, he made her subject to his own *mundium*." (Comparative Law of Marriage and Divorce by Renton and Phillimore, pp. 10 and 11.) The same author then proceeds :—The next stage was when

says[1]: "In connection with the formation of the relation of husband and wife agreement is first prescribed. Then taking by

the negotiation for the purchase price became separated from the marriage ceremony in point of time and this gradually led to the purchase price, instead of representing the value of the woman, becoming the sum paid to the head of the family for his giving up the *mundium*. This payment gradually lost its substantial character and retained only its symbolic character—symbolic of the binding nature of the contract of betrothal by the guardian. "The consent of the bride to this betrothal, though originally not required, became essential at an early period, and after once consenting, she became bound by the betrothal to allow herself to be given as a wife to the bridegroom, and to consider herself bound as such from that moment. The betrothal created a *vinculum jurius* between the bride and the bridegroom. Thus the sum of money which the bridegroom promised to pay again changed its character. Instead of being kept by the *mundoaldus* for the benefit of the nearest relatives (the family) it became a gift to the bride—at first partly, afterwards wholly—with the idea that it should serve as a provision for her widowhood. The bride was no longer bought by the bridegroom but provided with a *dos* by him." See Comparative Law of Marriage and Divorce by Messrs. Renton and Phillimore, pp. 11 and 12. In this stage the marriage ceremony still played a prominent part. The principal part of that ceremony was the taking possession of the wife by the husband corresponding to the *panigrahana* (or the taking of the hand of the bride by the bridegroom) of the Hindu marriage ceremony. But the marriage is not complete unless and until it is consummated by the *concubitus*. When the *mundium* of the family lost its importance by the gradual extension of the royal power and the consequent capacity of the executive authority to enforce the laws of the land there was a further change. This was the betrothal by the wife herself (it might be with the consent of the guardian) by which she promised that she would give herself as wife to the bridegroom. The marriage ceremony also changed in order to suit this form and the giving away of the bride by the guardian lost its significance. "The bride by fulfilling the contract which she entered into at the time of the betrothal gave herself into the *mundium* of her husband. Here, however, the old form was retained, and the giving away of the bride by her guardian, or some special representative—as a rule selected by the bride herself—remained one of the usual marriage ceremonies." *Ibid* p. 13.

1. The citation is apparently from Vasishta quoted in Parasara Madhaviya. We have not, however, been able to find out this text from the published original of Vasishta or from the translation as given in the Sacred Books of the East. The text is cited in the judgment of *Muthusami Aiyar* J. in *Venkatacharlu* v. *Rangacharlu*, (1890) I.L.R. 14 M. 316. In the text the agreement is mentioned and then the ceremony. The text is not more explicit about the nature of the agreement. When the text says that the mere agreement is defective, all that it means is that the transaction only goes so far and there is no complete marriage and the marriage can be complete only on the performance of the ceremonies. If before the performance of ceremonies either party withdraws, the status of marriage is not created by the mere agreement.

the hand is prescribed. It is said that mere agreement is defective and that of the two, taking by the hand is indispensable."

It is a common platitude to say that the Hindu theory is that when a legal relation such as marriage is once consecrated and confirmed by mantras or Vedic texts it is permanently and irrevocably fixed. I must, however, observe that this must be understood with some limitations. If there is no agreement, which is essentially involved even in the Hindu theory of marriage, the performance of rites will not create any relationship[1]. From the performance of rites an agreement may be inferred, but where that is not possible, as where there is fraud or force, the performance of rites will not of itself create a status[2]. For according to Hindu law as according to all other systems of jurisprudence, fraud vitiates all transactions and marriage is no exception to the rule[3].

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1. I am conscious that in making this statement I am going a little beyond the remarks made by the learned Judges in (1890) I.L.R. 14 M. 316. There is a learned criticism of this case in Vol. I, M.L.J. 627 to 641, reprinted at pp. 488 to 504. It must, however, be remembered that the text of Yagnavalkya and others stating the order of the persons entitled to give the girl away in marriage relates only to ceremonial law as already observed, *vide* note at p. 236, and that this and other similar texts do not declare the legal guardians for a girl. In fact who is the proper guardian of a child whether a son or a daughter cannot find a place in this chapter on marriage. If these texts have reference to the legal guardian of a girl they have no application to a minor son and surely the guardians cannot be different for the two cases. No difference can be made according to the sex of the children for legal guardianship. The case itself may be supported on the ground that the mother has an equal right with the father, and where the two differ, the action of either if *bona fide* and in the interests of the girl may be regarded as valid. The commentary of Medathithi on Manu's text, Ch. V, § 151, makes it clear that the mother has also dominion over her children and that the parents should act in mutual dependence as regards the marriage of a girl. In the gift ceremony she is also the actor as she has to pour water into the father's hands. However, it is not necessary in the present discussion to consider who are the proper legal guardians. It may, however, be stated that the Indian Majority Act does not extend minority to 18 or 21 years as the case may be for the purposes of marriage, so that the Hindu Law as to age of majority will apply.

2. The learned Judges in *Venkatacharulu* v. *Rungachari* (1890) I.L.R, 14 M. 316 are agreed that fraud or force vitiates a marriage notwithstanding the performance of rites.

3. "Yajnavalkya II, § 31 (coercion or undue influence); Manu IX, § 72 (fraud) and 168 (voluntarily and not by fear, &c); Vasishta, Ch. 17, § 73, S. B. E. Vol. 14. p. 92 (force); Baudhayana Pr. IV, Ad; I, § 15, Vol. 14, p. 314 (fraud or force)."; Narada, Part II, Head IV, § 8, S. B. E. Vol. 33 p. 129 Brihaspati Ch. XV § 9-11, Vol. 33 p. 343.

It is equally a common platitude to say that according to the Hindu law a wife is a dependent or even a slave of—the husband and that by reason of marriage the wife is more the property of the husband than anything else. Nothing is farther from the truth than this. Such a view may perhaps find support in the Roman law of marriage (or possibly in the archaic or primitive Hindu Law). According to the Roman law, marriage may be of two kinds:—with manus and without manus. In a marriage with manus the wife passes to her husband so much so that she is regarded as the daughter of her husband. The dependant position of a wife in a marriage with manus is not traceable in a marriage without manus, or as it is called free marriage, in Roman law. The Hindu law knows only one kind of marriage with reference to the position of the wife. There is a survival of the archaic view of *patria potestas* in the gift ceremony by which she ceases to have the gotra of her father and takes the gotra of the husband. This, however, is so when the marriage becomes complete with the ceremony of seven steps and when the marriage is in the Brahma and other three praiseworthy forms. In the case of Gandharva and other forms she still retains the gotra of the father[1]. The Hindu ideal is that the union between husband and wife is not merely for worldly enjoyment but is also for higher purposes. Her position, according to the Hindu law, is more than that of a partner with the husband. She is an associate both in life and in austerities to be performed by him. The ceremonies which the parties have to undergo for a marriage will bear this out. It may be stated that the ceremonies vary according to different countries and villages, and various customs there may be[2]. What is commonly accepted is stated by the sages.

"After he has sacrificed with (the verses) 'This, O Varuna, 'For this I entreat thee,' 'Thou Agni,' 'Thus thou, Agni,' 'Thou, Agni, art, quick,' 'Prajapati'—he makes her tread on a stone, with (the verse), 'Tread on this stone; like a stone be firm. Destroy those who seek to do thee harm; overcome thy enemies'"[3].

1. Note at p. 235, supra.
2. Aswalayana Grihya Sutra, Ad. 1, Kh. 7, § 1 and 2; Vol. 29 S. B. E., p. 167.
3. Grihya Sutra of Hiranyakesin, Pr. I, Pat. 6, S. 19, § 8, Vol. 30 S. B E. p. 188.

"'Saraswati! Promote this (our undertaking), O gracious one, rich in studs, thou whom we sing first of all that is.

'I seize thy hand that we may be blessed with offspring, that thou mayst live to old age with me, thy husband. Bhaga, Aryaman, Savitri, Purandhri, the gods have given thee to me that *we may rule our house*[1].'"

[" 'This am I, that art thou; that art thou, this am I; the heaven I, the earth thou; the *Rik* art thou, the Saman I. So be thou devoted to me.

'Well! *Let us here marry.* Let us beget offspring. Let us acquire many sons who may reach old age [2].' "]

"After the seventh step he(the bridegroom)makes her abide (in that position) and murmurs, '*With seven steps we have become friends May I attain to friendship with thee. May I not be separated from thy friendship.* Mayst thou not be separated from my *friendship*[3]' ".

The Hindu theory, that marriage is a religious sacrament and that the marriage tie once formed is indissoluble, represents, it cannot be denied, a high ideal which every society should strive to realise. Even those who take the view that marriage is or ought to be a civil contract concede that the union formed by such contract should be permanent and that the dissolution of such contract is a necessary evil which, as far as possible, must be minimised.

1. Hiranakesin's Grihya Sutra, Pr. I, Pat. 6, s. 20, § 1. S. B. E., Vol. 30, p. 189.

2. Sankhyayana Ad. I Kh. 13 §. 4, S. B. E. Vol. 29. pp 35, 36.

The portion bracketed indicates a slight variation in the translation of Grihya Sutra of Hiranyakesin, Vol. 30, p. 190.

[This am I, that art thou; the heaven I, the earth thou; the saman, I, the *Rikh* thou. Come! Let us join together. Let us unite our sperm that we may generate a male child, a son for the sake of the increase of wealth, of blessed offspring, of strength.

Bountiful Indra, bless this woman with sons and with a happy lot. Give her ten sons; let her husband be the eleventh]. Vol. 30 S. B. E p. 190, Grihya Sutra of Hiranyakesin, Pr. I, Pat. 6, S. 20, S. 2.]

3. Grihya Sutra of Hiranyakesin Pr. I, Pat. 6, S. 21. See also Sankhyayana Vol. 29, p. 38; Aswalayana Vol. 29 pp. 167 to 170. There are other passages in other parts of the ceremonies which bear out our view that by the union or status, the wife becomes a friend and not a slave or dependent of her husband. The ceremonies are well worth reading and perusal. The ceremonies are stated in their different parts being D to T of the synoptical survey of Grihya Sutras given in S. B. E. Vol. 30, p. 300 to 301. Under these headings references to the various Grihya Sutras are given.

The Hindu law is not alone in this conception of sacredness of marriage. Even according to Christianity marriage had to be solemnised by a religious ceremony, and religion and law stood on the same footing in European countries for a long time so that permanence and indissolubility was fixed as a characteristic of the marriage tie. Ever since the decree of the Council of Trent in November 1563, marriage, in Christendom, at any rate according to the Church of Rome, has been regarded as a sacrament constituting an indissoluble union, and even to this day. this is the law in most Catholic countries. This was also the law of England until January 1858 when a statute was passed sanctioning divorce for certain causes.[1]

This leads us to the vexed question of the propriety of a divorce law. It is needless to say that there has been much difference of opinion both among lawyers and theologians even in Europe as to the lawfulness or propriety of dissolving marriage by divorce. The Roman Catholics even in England still adhere to the law of the Council of Trent and regard marriage as indissoluble and severable only by death. Others in England regard the law of divorce as the law of the rich and not of the poor.

It is a question whether an exhibition of human weakness and depravity in court does not really contribute to the contamination of the moral atmosphere around [2]. It certainly does not contribute to elevate the moral tone of society. Apart from this, those who advocate divorce are not agreed as to the methods adopted and there is a great divergence of view among them. Most of such people admit that though marriage should be treated as a contract it should be regarded as a special one, so special as to be completely isolated from other contracts. It is upon this ground marriage is regarded as a sacrament by those who view it as such. There are those who think that there is some question of public policy and morality to be considered apart from what is just and convenient to the parties concerned and upon that ground

1. See The Matrimonial Causes Act 1857, 20 & 21 Vic. Ch. 85. This Act does not extend to Ireland where a dissolution of the marriage tie can therefore only be obtained by an Act of Parliament.

2. The Mahomedan Law of Divorce is free from any objection on this ground at any rate.

will allow restrictions as to the grounds of divorce. Then again there are those who think that there is no use of amending the law of divorce without amending the law of marriage. According to these, marriage should be regarded as any other contract and the grounds which avoid a contract in general should also avoid a contract of marriage. Lastly, there are those who think that there are other interests at stake[1], viz., those of the children and the community in general. These latter form the School of Eugenics. According to this school, marriage and divorce come under the same moral law. Just as there are marriages which, in the interests of the race, ought not to take place, so there are marriages which, having taken place ought, in the interests of the race, to be dissolved. While thus those who view marriage as a contract are not yet agreed as to the extent to which and the means by which the law should allow divorce, it is idle to extend that law to a society which has for ages acted upon the principle that marriage is a sacrament and not a contract. As an able writer in the *Fortnightly Review* of September 1910 observed: "Laws which race ahead of social custom are notoriously unsuccessful, and divorce law in particular requires the support of public opinion." Certainly no laws should be attempted which have a tendency to lower the ideals which guide society. The theory that parties should have absolute liberty of action inculcated by the works of Mill and other free-thinkers is not now accepted in many departments of life, and the legislature has frequently intervened to cut down this liberty.

The Hindu conception of marriage is pre-eminently a superior one which has worked on successfully for centuries if not ages. This is due to the fact that our law-givers have given to Hindu society a high-ideal of wifehood. Notwithstanding the cant of European writers who cannot understand Hindu customs and manners of thought and the books of our law-givers it is ennobling to find the anxiety and concern displayed by our law-givers in order that the society they had to deal with might realise their ideal conception of marriage. It is not of course correct to say that our Hindu sages or law-givers were ignorant of the worldly motives which guided

1. The fact that other interests are at stake may be a ground for not dissolving the marriage that has taken place.

people in contracting unions.[1] But precisely because the sages realised that worldly motives prevailed, or would prevail, among the generality of people they gave this high ideal and strove very hard to make that ideal capable of realisation. The marriage ceremonies which a Hindu ought to perform in order to enter into this order of marriage breathe from beginning to end this ideal[2] and the duties inculcated by[3] the sages as those

1. Cf. Apasthamba Sutra, Patala I, Ch. 3, v. 20. S. B. E., Vol. 30, pp. 257 and 258. See also Rig Veda.

2. See Synopsis of Grihya Sutras, S. B. E., Vol. 30, pp 300, 301. See also Grihya Sutras of Hiranyakesin, Pra. I, Pat. 7. S. 24, v 4. S.B.E., Vol 30, p. 198. "He then co-habits with her with (the formula) 'United is our soul' united our hearts, united our navel, united our skin. I will bind thee with the bond of love, that shall be indissoluble."

3. The texts relating to this may be grouped under 3 heads: (*a*) Texts directly inculcating union and harmony; (*b*) texts merely enumerating duties of husband or wife or both; and (*c*) texts detailing punishment or consequences involved on a breach of obligation on the part of either spouse.

(*a*) First as regards texts dealing with union and harmony:—Cf. Manu Chapters § 150, 151, 154 to 156, 158 to 160, 164 to 166. S. B. E. Vol. 25. pp. 195—197 says. 150. "She must always be cheerful, clever in (the management of her) household affairs, careful in cleaning her utensils, and economical in her expenditure. 151. Him to whom her father may give her, or her brother with the father's permission, she shall obey as long as he lives; and when he is dead she must not insult (his memory). 154. Though destitute of virtue or seeking pleasure (elsewhere), or devoid of good qualities, (yet) a husband must constantly be worshipped as a god by a faithful wife. 155. No sacrifice, no vow, no fast must be performed by women apart (from their husbands); if a wife obeys her husband she will for that (reason alone) be exalted in heaven. 156. A faithful wife who desires to dwell (after death) with her husband, must never do anything that might displease him who took her hand, whether, he be alive or dead. 158. Until death, let her be patient (of hardships), self-controlled and chaste, and strive (to fulfil) that most excellent duty which (is prescribed) for wives who have one husband only. 159. Many thousands of Brahmins who were chaste from their youth have gone to heaven without continuing their race. 160. A virtuous wife who after the death of her husband constantly remains chaste, reaches heaven, though she have no son just like those chaste men. 164. By violating her duty a wife is disgraced in this world, (after death) she enters the womb of a jackal and is tormented by the diseases, (the punishment of her sins). 165. She who, controlling her thoughts, words and deeds, never slights her lord, resides (after death) with her husband (in heaven), and is called a virtuous (wife). 166. In reward of such conduct, a female who controls her thoughts, speech and actions, gains in this (life) highest renown; and in the next (world) a place near her husband". See also Manu Chap. IX, § 11, 12, 22, 26, 27, 28 and 29

involved in the relation of husband and wife are the means devised to promote the realisation of this ideal.

S. B. E. Vol. 25. pp. 329, 331, 332, 344 and 345. "11. Let the (husband) employ his (wife) in the collection and expenditure of his wealth, in keeping (every thing) clean, in the (fulfilment of) religious duties in the preparation of his food and in lookng after household utensils. 12. Women confined in the house under trustworthy and obedient servants are not (well) guarded; but those who of their own accord keep guard over themselves are well guarded. 22. Whatever be the qualities of the man with whom a woman is united according to the law, such qualities even she assumes, like a river (united) with the ocean. 26. Between wives (striyah) who (are destined,) with husbands to bear children, who secure many blessings, who are worthy of worship, irradiate (their) dwellings between the goddesses of fortune (striyah who reside) in the houses of men there is no difference whatsoever. 27. The production of children, the nurture of those born, and the daily life of men (of these matters) woman is visibly the cause. 28. Offspring, (the due performance of) religious rites, faithful service, highest conjugal happiness and heavenly bliss, for the ancestors and one-self depend on one's wife alone. 29. She who, controlling her thoughts, speech, and acts, violates not her duty towards her lord, dwells with him (after death) in heaven, and in this world is called by the virtuous a faithful (wife, sadhir). 95. The husband receives his wife from the gods, (he does not wed her) according to his own (will); doing what is agreeable to the gods, he must always support her (while she is) faithful. 96. To be mothers, were women created; and to be fathers, men; religious rites, therefore, are ordained in the Veda to be performed (by the husband) together with the wife. 101. Let mutual fidelity continue until death. This may be considered as the summary of the highest law for husband and wife. 102. Let man and woman united in marriage, constantly exert themselves, that (they may not be) disunited and may not violate their mutual fidelity. 103. Thus has been declared to you the law, for a husband, and his wife, which is intimately connected with congugal happiness and the manner of raising offspring in times of calamity, learn (now the law concerning) the division of the inheritance" See also Vasishta, Chapter 21. v. 14; S.B.E. Vol. 14, p. 112, says: "Faithful wives who are constantly pure and truthful (reside after death) in the same abodes with their husbands; those who are unfaithful are born as jackals." In Baudhayana, Prasna II, Adhyaya K. 3, v. 47, S. B. E. 14, p. 232, it is said: "Those (women) who strive (to do what is) agreeable to their husbands will gain heaven."

Vishnu, Chapter 25, § 2 to 8, 172, dealing with this subject says: "2. To live in harmony with her husband. 3. To show reverence (by embracing their feet and such-like attentions) to her mother-in-law, father-in-law, to Gurus (such as elders), to divinities, and to guests. 4. To keep household articles (such as the winnowing basket and the rest) in good array; 5. To maintain saving habits: 6. To be careful with her (pestle and mortar and other) domestic utensils; 7. Not to practise incantations with roots (or other kinds of witchcraft); 8. To observe auspicious customs. 17. A good wife, who perseveres in a

Passing from such controversial points as these it is useful to consider the effects of marriage. Most systems of law accept

chaste life after the death of her lord, will go to heaven like (perpetual) students even though she has no son. (In Chapter 99, § 8, 14, 16, 17, 19, 20, 21, S. B. E., Vol. 30, 298 299, 300 and 301, the same author says: "8. But learn from me, where I reside besides. 14. In the body of a married woman, in the frame of an unmarried damsel. 16. I reside in the consecration of a king, in the marriage ceremony, in a sacrifice in a bridegroom. 17. In a new born infant, in a suckling, in a virtuous man, and in one wholly bent upon practising the law. I (reside) in one who is satisfied with his own wife (and does not covet other men's wives) 20. (I reside) in one habitually veracious, in one friendly towards all creatures, in a married house holder. 21. (I reside) in women who wear proper ornaments always, who are devoted to their husbands whose speeches are kind, who keep up saving habits, who have sons, who keep their household utensils in good order, and who are fond of offering domestic oblations. 22. (I reside) in women who keep the house clean (by scouring it, plastering it with cow-dung, and the like), who keep their organs of sense under control, who are not quarrelsome, contented, strictly observing the law, and charitable." Apasthamba. Prasna II, Patala 6, Khanda 14, verses 16 to 19. S. B. E. Vol. 30 p. 16, says: "No division takes place between husband and wife. 17. For, from the time of marriage, they are united in religious ceremonies. 18. Likewise also as regards the rewards for works by which spiritual merit is acquired. 19. And with respect to the acquisition of property." See also Vyasa, § 18, 19, 26, 27, Dutt pp. 510, 511, 512: "18. Day and night the wedded couple should be one in spirit in respect of all matters of piety, gain, and desire (enjoyment). They should be one in vows and practices. 19. A woman has no separate existence from her lord in matters of piety, gain and desire. The sastras have enjoined this dependency of love. 27. Pure in her thought, speech and action, and obedient to the dictates of her lord she should follow him (in life) like his own shadow, seek his good like a trusted friend and minister to his desires like a servant". Yagnavalkya Ch. 1, § 87 and 121. See Dutt p. 16, 21. "87 [The woman who is] devoted to the well-being of her husband, is observant of good conduct and has [her] senses under restraint, reaps glory in this world and incomparable bliss in the next. 121. [He should be] devotedly attached to his wife, be of pure conduct, a protector of servants and given to the performance of shraddha. With the recitation of the mantra-Namas, he should perform the five yagnas". Sankha, Ch. IV, § 15 and 16 Dutt p. 617. "15, She who bears the sacred fire is a true wife; She who is one in spirit with her husband is a true wife; she who has borne children, is a true wife. 16. A wife should be both caressed and admonished; both fondled and checked, a wife becomes the source of beauty and prosperity of the household, and not otherwise". Katyayana, Ch. 19, § 12 and 13. See Dutt, pp. 399 and 400. "12. Is there any region which a woman serving her husband does not attain? Again returning to this world from the celestial region, she becomes like an ocean of happiness. 13. What *Homa* is laid down for that person, maintaining his Sacred Fire, who having

the theory that upon marriage the wife is merged in the husband. That is the English law, the Roman law and the Hindu law.

a living wife wishes for other wives, for some reason or other. 1 A *Homa* should never be performed by the Ritwik and others in the absence of the married couple. What is done in their absence becomes profitless". Daksha Chapter IV, § 1 to 7. See Dutt pp. 445 and 446. "1. The household of men has the wife for its root, if she follows the Vedas; there is none equal to the domestic mode of life, if a wife is under the control of her husband. 2-4. With her, one reaps the fruits of the three fold objects of life, namely:—Dharma (Virtue), Artha (wordly profit) and Kama (desire). If she follows her own will and is not curbed [by her husband] out of love, she becomes uncontrollable. Afterwards like unto a disease neglected. She who follows the will of her lord, does not give vent to evil words, is an expert, is chaste, speaks pleasant words, is protected by her own self, and is devoted to her consort, is a goddess and not a woman. 5. This world is like a celestial region unto him whose wife follows him obediently. It is like a hell unto him whose wife is against him. There is no doubt in it. 6. Mutual attachment [between husband and wife] is rare even in the celestial region. There is nothing more painful than the fact that one is attached to, and another is unfavourably disposed towards, (the other). 7. The domestic mode of life is for happiness; and happiness is dependent on a wife in the house. She, who is humble, knows the mind and is under the control [of her husband]—is a [real] wife'.

(*b*) Texts detailing the duties of husband and wife:—Some of these have been included in (*a*); others are as follow:—Vishnu Dutt p. 875 § 2 to 8. "2. To observe the same religious rites as their husbands. 3. To serve her elders, mother-in-law and father-in-law, as well as the gods and Athithis (arrived at her house). 4. To keep her household articles cleansed and in proper array. 5. Not to be lavish in her expenses. 6. To keep her purse concealed. 7. Not to practise love-charms with root or drugs. 8. To observe auspicious custom." Vyasa Ch. II § 20 to 25, 28 to 36. p. 510, 511 and 512. "20. A wife should quit her bed before her lord, cleanse (wash) her person, fold up the beds, and make her house clean and tidy. 21. Then having entered the chamber of *Homa* (Sacrificial Fire) she should (first) wash and plaster its floor, and then the yard of her house, and after that, wash with warm water the vessels of oils, clarified butter, etc., which are used in connection with Agnikaryayas, and keep them in their proper places. 22-23. Utensils or implements, which are used in couples (such as the pestle and mortar, etc.,) should never be separated. The vessels (of rice, &c.,) should be cleansed and refilled with their respective contents, and the kitchen-utensils should be taken out, cleansed, and replaced in their proper positions." Vyasa p. 510 § 24. "24. The oven should be repaired and replastered with earth and clay, and the fire should be lighted therein. Thus having performed her morning (house-hold) duties, and pondered over the dishes of different flavours (to be prepared that day), and allotments of work to different workers, and the daily expenditure of the household, she should make obeisance to her elders and superiors. 25. Then she should decorate her person with the ornaments given to her by her father-in-law, husband, father, mother, maternal uncles or relations. 28. Then having finished cooking, she should report of it to her husband saying "the rice is cooked." The husband having made offerings therewith to the Vishvavedas, she should first feed the children, and then serve out the morning

The wife has become one with the husband is a saying familiar

meal to her lord. 29, Then, with the permission of her lord, she would partake of the residue of the boiled rice and cooked dishes (described above), and spend the closing portion of the day in contemplation of the family earnings and expenditure. 30. Having again attended to the cleansings of the house, etc., at evening, she should cook the night meals (of the household) and provide her husband with a sumptuous repast. 31. Then the cheerful lamps should be lighted, and she, having spread out a comfortable bed, attend to massage the body of her lord. 32 After her husband had slept, she should lie down by his side, not entirely bereft of clothes, with her mind fully centered in his self, cautious, non-desiring and with her passions held under a healthy control. 33. She should not speak too loudly, nor harshly, or unpleasantly to her lord, avoiding all quarrels, lamentations, and perfidies. 34-35. She should not be prodigal in her purse, nor hostile to the spirit of piety or gain. Carelessness, fickleness of mind, anger, envy, deception, vanity, rivalry, mischievousness, cruelty, inordinate pride, cunningness, atheism, daringness, discontent, and dissimulation are the fifteen vices which a chaste wife should always try to renounce. 36. A chaste wife, who thus worships her lord, acquires fame and blessings in this life, and lives in the same region with him, after death."

Gautama in Ch. 18 § 2 & 3. S.B.E. Vol. II p. 270 says: 2. Let her not violate her duty towards her husband. 3. Let her restrain her tongue, eyes, and (organs of) action." Katyayana Ch. 19 § 3 & 4, Dutt pp. 398 and 399. "3. A woman devoted to her husband and seeking good fortune wealth and non-widowhood, should also humbly serve the Fire without, any break. 4. One should engage in this right a wife who has given birth to heroic sons, who carries out the behests of her consort, is beloved, expert in business, speaks sweet words and is spotless." Daksha Ch. IV § 12 and 13, Dutt p. 447. "12. Obedient, unsullied by harsh speech, expert, chaste and devoted to her husband,—a wife, endued with all these accomplishments, is, forsooth, the Goddess of Prosperity personified. 13. She, who is always of a delighted mind, acquainted with the position and number of household articles, and always affords satisfaction unto her husband, is the real wife; others are like decrepitudes."

(*c*) Texts inculcating fear etc., are these:—Apastamba Prasna II Patala 10 K. 27 § 6. S.B.E. Vol. II p. 166. "6. If the (marriage vow) is transgressed both (husband and wife) certainly go to hell. "Parasara § 15, 16 p. 555. 15." He, who forsakes a chaste innocent wife in youth, is sure to take birth as a woman in his seven successive incarnations suffering the pangs of widowhood in each of them. 16. She who lightly treats of her husband for his poverty or ignorance, takes birth as a female serpent in her successive rebirths, punished with the privations of a widowed life even in such hateful incarnations." Vishnu in Ch. V § 163 says: "The same punishment, *i. e.*, of a thief is ordained (for a husband who forsakes) a blameless wife." Again in Ch. 37 § 6 the same author says: "Thus have the crimes in the fourth degree been enumerated for (abandoning) one's holy fire or one's father, mother, son, or wife." Katyayana Ch. XIX § 7 Dutt p. 399. "The woman following the commands of her husband who, like Uma, gratifies the Fire manifold religious observances, attains to good luck in the next world." Daksha Ch. IV § 17 Dutt p. 447. "He, who renounces, in youth, a wife who is free from any fault and is not degraded, will attain, after death, to womanhood and become barren."

to the law[1]. But although all these systems recognise the doctrine of merger the genius of Hindu law-givers has solved the problem as to the effect of marriage upon the wife's capacity generally in a markedly different way from that worked out by the English jurists and the jurists in other systems of law. A wife, according to Hindu law, has an absolute capacity to enter into contracts binding upon herself[2] and to hold property for herself[3]. A gift by the husband to the wife is perfectly valid[4] and becomes her stridhanum[5] and proceedings

1. Manu Ch. IX § 46 S.B.E. Vol. 25 p. and Apasthamba Prasna II Patala 6 K. 14 § 16 to 18 S.B.E. Vol. II p. 132.

2. Some early English writers on Hindu Law have expressed an opinion that coverture according to Hindu Law incapacitates a woman from binding herself by any contract. See 1 W. H. Macnaghten, Vol. I, p. 122 3rd Edition. Reference is there made to case No. 2 reported in Vol. II p. 278 but the authorities cited all relate to cases where it has been declared that the wife is not liable for the debts of her husband or that the debt contracted by the wife for the support of the family is binding upon the husband or other persons representing the estate. Indeed after admitting that the wife has entire dominion over her stridhanam (excepting immoveable property given to her by her husband) it cannot be consistently stated that the wife has no power to contract. The statement in Sir Thomas Strange's book, 1825 Edn., Vol. I, p.275, that "as respects the wife, it (the power of contracting) may be taken to be commensurate with her right of property as consisting in her *stridhan* land excepted; the exception applying, in the Bengal provinces, only to such as may have been given her by her husband; of which she certainly cannot *dispose*, and with regard to which it follows, that she cannot *contract*. Beyond this, it is laid down, very generally, in many places, that for *necessaries* in support of the family, including herself, she may bind her husband by her contracts," more correctly represents the Hindu Law.

3. See the texts relating to Stridhanam which will be found in almost all books on Sanskrit law.

4. A gift by the husband to his wife is one kind of *stridhanam* known to Hindu Law, and when once a capacity to contract is admitted it must follow that a gift by the wife to the husband or *vice versa* is proper and valid. In fact a gift by the wife does not come under the class of invalid gifts referred to by the Smriti writers. The Hindu Law as regards such invalid gifts is accurately summed up in Shyama Charan Sirkar's Vyavastha Chandrika, Vol. II, Part I, § 845, pp. 616 and 617.

Of course where a gift by the husband and wife consists of land or other immoveable property a special rule based upon a text of Narada is laid down by the Hindu writers that such land is not alienable though it may be *stridhanam*. This exception only emphasises the existence of the general rule that the wife has capacity to enter into contracts and is unrestricted except in cases provided for by express texts. So also in Viramitrodaya, Ch. V, Part I, S. 8 it is stated: "What the husband promised to give to his wife must, when he is dead, be given to her by the son and the like. This too is declared by the same sage: "Property promised by the husband to his wife must be paid by his sons just as his debts." See also Smritichandrika, Ch. IX, S. 2, v. 25.

5. See Manu, Chapter IX, § 195. S.B.E., Vol. 25, p. 371 Yagnavalkya, Ch. II, §. 146.

between the husband and wife can be taken with reference to such property[1].

Notwithstanding the alleged dependant position of women, and of wives in particular, which it is said is the view held out by our law-givers, a wife can hold property called *stridhan* in the language of Hindu law. Her husband has no control over such stridhan[2] and she can alienate the same at her will and

1. A text of Yagnavalkya, Ch. II, § 148, seems to give the husband liberty to use the wife's property under certain circumstances: "A husband is not liable to make good the property of his wife, taken by him in a famine or for the performance of a duty, or during illness or while under restraint." Whether this text is only one of moral obligation, *i. e*, whether it can be regarded as giving a husband a legal right to use the property of the wife may be a question ; even if it were otherwise, the author of the *Mitakshara*, commenting upon this text, says that "if, under other circumstances, the husband makes away with his wife's property and being required to refund, and having assets, refuses to do so then a judicial proceeding may be entertained between husband and wife."

2. Except for the text of Yagnavalkya, Ch. II, § 148 and except under the circumstances ennunciated therein, this statement is correct and will follow from the text declaring the independence of the wife in her *stri-dhanam* cited in the next note. Thus in the Smriti Chandrika, Ch. 9, S. 2, p. 13, it is stated: "As for the husband and the like, they possess no independent power over any sort of stridhana, for Katyayana says:—Neither the husband, nor the son, nor the father nor the brothers can assume the power over a woman's property to take it or bestow it." This is because the husband and others possess no ownership over such property. Hence the same author continues:—"If any one of these persons by force consumed the woman's property, he shall be compelled to make it good with interest and shall also incur a fine.. If such person having obtained her consent, used the property amicably, he shall be required to pay the principal when he becomes rich." To the same effect are the passages in Saraswati Vilasa, pp. 275 and 276. Although a husband has no control or independent power over his wife's stridhana except in an extreme case referred to in Yagnavalkya, Ch. II, § 148, and the wife has independent power over her own stridhanam as will be seen from the passages cited in the next note it cannot be said that the Hindu text writers have completely shaken themselves free from the archaic theory of a community of interest in property as between the husband and wife. In fact the exception referred to by Yaganavalkya, Ch. II, § 148, is only a survival of this archaic theory apart from the question whether there is any legal right created in the husband under the circumstances stated in that case. We have already referred to a text of Apasthamba which declares that husband and wife have power over their common property. See Apasthamba-Prasna II, Patala K. 29, § 3: S.B.E., Vol. II, p. 170. Apasthamba also says that from the time of the marriage the husband and wife ware united with respect to the acquisition of property.

pleasure[1]. In spite of the boasted superior development of the English law the conception of property of the wife as distinct from that of the husband was quite unknown to it until quite

See Apasthamba Prasna II, Patala 6, K. 14, § 19 and 20: S.B.E, Vol. 2, p 137. 19 "(For, from the time of marriage they are united)". And with respect to the acquisition of property. 20. "For they declare that it is not a theft if a wife expends money on occasions (of necessity) during her husband's absence." From this it indeed follows that it would not be theft if the wife had expended her husband's money on occasions of necessity. Nor would it be a theft on the part of the husband to use the wife's property in times of distress. The Viramitrodaya, in explaining the passage of Yagnavalkya, Ch. 2, § 141, says by reason of that and other similar texts the husband to that extent is the owner of the wife's property for the purposes and under the circumstances therein stated. Viramitrodaya, Ch. 5. See Part I, S. 7. Sirkar's translation, p. 226. The author of the Sarasvati Vilasa, however, denies even a secondary power to the husband over his wife's property though he seems inclined to think that the wife may have a secondary proprietorship in her husband's property. Sarasvati Vilasa, S. 275. As already stated, however, Yagnavalkya's text creates no legal right in the husband and the position is similar to the texts giving a right of interdiction to the son in respect of the father's self-acquired immoveables which the Privy Council have recently held inculcates no legal rule. See *Balwant Singh* v. *Rani Kishori* (1898) I. L. R. 20 A. p. 267.

1. The leading text upon the subject is that of Katyayana cited in the Viramitrodaya, Ch. 5, Part I, S. 21, p. 442: "The independence of women who have received a kind gift, is admitted (in respect of it) for it was given by them out of kindness, for their maintenance; with respect to a kind gift the independence at all times of women is proclaimed in making sale or gift according to pleasure even when it consists of immoveable property." Katyayana logically denies the right of the husband to consume or otherwise dispose of his wife's stridhanam. This passage is also cited in Viramitrodya Ch. 5, Sircar's Translation, p. 225: "Neither the husband, nor the son, nor the father nor the brothers, can assume the power over the woman's property to take it or give it away. If any of these persons forcibly consume a woman's property he shall be compelled to make it good with interest, and shall also incur a fine. If such a person having obtained her consent amicably consume her property, he shall be required to pay the principal when he becomes rich (enough to pay it). But if the husband have a second wife and do not show honor to the first wife, he shall be compelled by force to restore her property though amicably lent to him. If food, raiment and dwelling be withheld from the woman, she may exact her due supply and take a share (of the estate) with co-heirs." The Smrithi Chandrika affirms (Ch. 9, S. 2, v. 12) the independent power of the woman over what is called Saudhayika and the husband's donations except immoveables and states that she has no independent power over other sorts of the stridhanam. Seeing that as regards even a person's self-acquired immoveable estate restictions are stated in some of the texts (such restrictions being only a survival of the archaic doctrine of ancient law against alienations generally) this statement of the author of the Smritichandrika is not surprising especially when we know that the author is one who is not generally in favour of advancing the position of women. The position stated by the author of the Viramitrodaya more correctly represents the law

recent times[1]. The doctrine of separate use of the equity courts which, however, was distinct and different from the doctrine of separate property, came to be recognized only in the 18th century[2]. Again, it was only about the end of the nineteenth century that English lawyers were able to recognise the conception of separate property in the wife which had been evolved and worked out in detail by the Hindu lawyers ages before the Christian era. So also, according to English law,

according to which women have independence as regards all stridhanam except in respect of immoveable property given by the husband. This exception is based by the author of the Viramitrodaya on a text of Narada. The Mitakshara gives only a description of stridhana property. No discussion is found either as regards woman's power of disposal or existence of restrictions. It is only in accordance with Hindu Law that the Privy Council has held that a woman has power of absolute disposal (except possibly in the case of immoveable property given by the husband without express pwers of alienation) as regards her stridhanam. See. I. L. R. 1 M., p. 281.

1. The relations between husband and wife according to English Common Law are well stated in STORY on *Equity*, paragraph 1367 (American Edition). The learned writer there observes : "It is well-known that at common law husband and wife are treated, for most purposes, as one person, that is to say, the very being or legal existence of the woman, as a distinct person, is suspended during the marriage, or, at least is incorporated and consolidated with that of her husband. Upon this principle of the union of person in husband and wife depend almost all the legal rights, duties, and disabilities which either of them acquire by or during the marriage. For this reason, a man cannot grant anything to his wife, or enter into a covenant with her, for the grant would be, to suppose her to possess a distinct and separate existence. And, therefore, it is also generally true that contracts made between husband and wife, when single, are avoided by intermarriage. Upon the same ground it is, that if the wife be injured in her person or property during the marriage, she can bring no action for redress without the concurrence of her husband, neither can she be sued, without making her husband also a party in the cause."

2. See POLLOCK on *Contracts* p. 80. See also HAYNE'S *Outlines of Equity*, S. 7, p. 2117. In MACQUEEN'S *Husband and Wife*, p. 334, however, it is stated that indications of the doctrine are discernible so early as Queen Elizabeth, and that it seems to have been plainly recognised by Lord Nottingham, Lord Somers and Lord Cowper. The author adds : "In Lord Hardwicke's time it was perfectly established ; but it was not fortified and made secure till Lord Thurlow sanctioned the clause against anticipation, whereby the wife, for whose benefit this fabric had been reared, was precluded from destroying it." According to WOOD RENTON'S *Encyclopaedia* of *the Laws of England* the doctrine of separate use seems to have its origin from the doctrine of trust in marriage settlement which came for decision in *Gore* v. *Knight* : (1705) 2 Ves. 535 s. c. 33 E. R. 946 ; and the doctrine was upheld by the Courts of Equity later in the middle or towards the end of the eighteenth century. See Vol. 6, *Husband and Wife*, p. 653, 2nd Edition.

no gift could be made by the husband to his wife[1], no contracts could be entered into between them[2] and no proceedings could be taken as between the husband and wife[3].

In Roman law, in the case of a marriage with a manus, "whatever the wife possessed at the time of her marriage passed to the husband by the necessary operation of the law and the same rule applied to all property acquired by her after her marriage whether by gift, devolution, personal services, or otherwise[4]". In the case of a marriage without manus, or as it was called free marriage, the wife's ante-nuptial property as well as what she acquired during coverture belonged to her alone[5]. The Roman law, however, even in such free marriages, recognised no mutual gifts between husband and wife and the husband and wife could not sue each other for theft or in respect of other matters[6].

As regards the wife's right of succession prior to the Statutes of Distributions the English law was doubtful with respect to the personal property of the husband. In fact the right of the next of kin to take as a class was doubtful[7]. In the real estate she had a right of dower. After the Statutes of Distributions (22 & 23, Car. II, c. X and I Jac. II, c. 17) the wife gets one-third in the

1. According to Littleton (60 Litt. 112-A) "A man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law." Lord Coke adds to this: "A man cannot covenant with his wife to stand seized to her use ; because he cannot covenant with her for the reason that Littleton here yieldeth." See also WILLIAMS on *Real Property*, 19th Edition, p. 305.

2. In MACQUEEN'S *Husband and Wife* it is stated that according to Common Law a person could not convey or transfer either real or personal property to himself, whether alone or jointly with another. It followed from this that neither husband nor wife could contract with the other.

3. Even now the law of England is that the husband and wife cannot sue each other in tort unless the action be brought by the wife for the protection and security of her separate property ; see WOOD RENTON'S *Encylopaedia of the Laws of England*, Vol. 6, Husband and Wife, p. 684. See also MACQUEEN'S *Husband* and *Wife*, p. 451.

4. Sohmn's Institutes of Roman Law, S. 81 sub. sec. 1 p. 369.

5. Do. S. 18 Sub. S. 2 p. 371.

6. Do. S. 81 Sub. S. 2 p. 371.

7. At any rate there was no legal remedy available prior to those statutes though by 13 Ed. I, Ch. 19, it was enacted that the ordinary should be bound to answer the debts of the intestate; that was only with reference to the debts and there was no process to compel the ordinary to make a distribution. See WILLIAM'S *Personal Property*, 16th Edn., pages 473 and 479.

presence of issue and half when there is none. Under the Roman law, "in compensation for the rigorous subordination of the wife to her husband in proprietary matters she is given just the same rights of succession on her husband's death as though she were a *filia familias*, *i. e.*, she is counted together with her children as one of the '*sui heredes*' of her husband.[1]" A free marriage, according to the civil law, did not give mutual rights of succession between husband and wife as such.[2] The pretorian law allowed such succession where none of the relations succeeded to the inheritance.[3] Again, the Hindu law, unlike the Roman law, gives a *mutual* right of succession to the husband and wife in case of *intestacy* of either, and this right of the wife's succession is a *primæval* one according to Vivada Chintamani [4] and unlike the French law gives no present community of interest.[5] In the quaint language of some of our commentators, the Nibhandhanakars, the wife being the surviving half of the husband, nobody else could take as long as such half survived, and her exclusion by the son might be explained on the ground that the latter was not merely the half but the whole of his father.

(*To be continued*).

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1. Sohmn's Institutes of Roman Law, S. 81, Sub. S. 1, p. 360.
2. Do. S. 81, sub. S. 7 p. 370.
3. Do. at p. 371.
4. See Tagore's Translation, p. 290.
5. See WOOD RENTON and PHILLIMORE'S *Comparative Law of Marrige and Divorce*, p. 476. Community of interest in property was apparently the rule even under the ancient Hindu Law. Apasthamba Prasna II, Patala 11, K. 29, v. 3. also Prasna II, Patala 6, K. 14, v. 20. Saraswati Vilasa, S. 275. Smritichandrika Ch. 9, S. 2, Pl. 13. See Smritichandrika Ch. 11, S. 1, Pl. 6. A text of Brihaspati is also cited in Placitum 4 of the same chapter. See also the text of Prajapati cited by the author of Smritichandrika, Ch. 11. S. I, Pl. 12.

TRANSLATION

OF

APARARKA'S COMMENTARY ON YAGNAVALKYA.

(*Continued.*)

Slokas 128-132. — Several kinds of sons.

" The aurasa is the son procreated on the lawful wedded wife. Equal to him is the son of the appointed daughter. The kshetraja is one begotten on the wife by a sagotra or by some other." 128

" The gudhotpanna is a son secretly produced in the house. The kanina is a son born of an unmarried woman. He is considered as the son of his maternal grandsire." 129

"A paunarbhava is the son begotten on a woman whose [first] marriage has not been consummated on one who had been deflowered (before marriage). He whom his father or mother gives in adoption shall be considered to be the dattaka." 130

" The krita is one sold by them. The kritrima is a son adopted by a man himself. The svayamdatta is one who gives himself. The sahodaja is one accepted while yet in the womb." 131

" The son deserted for any cause by the father and mother and who is taken as a son is the apaviddha." 132

He who is born of the *dharma patni* (wife) is known as the aurasa son. She with whom he observes his religious duties is the *dharma patni*. Though even the term *patni* (by itself) indicates companionship in religious duties, yet by the use of the term *dharma*, here patni means only wife. By the term *dharma patni* the Sudra wife is excluded because of the absence of her companionship in religious duties.

Vasishta says :—"A Sudra wife is only for conjugal felicity and not for religious duties."

For this reason, her son is not an aurasa son. Therefore *Manu* has spoken of him as a substitute for a son.

Slokas 128-132.

Several kinds of sons.

" Of the twelve sons of men, whom Manu, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs (*except to their own fathers*) but kinsmen."[1]

" The son begotten by a man himself in lawful wedlock (aurasa), the son of his wife begotten *in the manner before described* (the kshetraja), a son given *to him*, a son of concealed birth, or *whose real father cannot be known*, and a son rejected *by his natural parents* are the six kinsmen and heirs."[2]

" The son of a young woman *unmarried*, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a Sudra, are the six kinsmen, but not heirs to collaterals."[3]

" The wise declare that these eleven sons (kshetraja and the rest as enumerated) are substitues *in order* for sons of the body, for the sake of preventing a failure of obsequies."[4]

They say that to the wise man who is afraid of the omission, in the absence of the aurasa son by reason of the default of the obsequies performable by him, the eleven commencing from the kshetraja are the substitutes of the son. Though the son by the Sudra wife is one of the substitutes of the son it has been said when dealing with partition among "sons" that he (the Sudra son) also gets a share even when there is an aurasa son. That is why Yagnavalkya did not include him among the substitutes. It need not be asked why the Sudra son has been declared to be not an heir.[5] (For) it has been said by Manu that he has no share when he is possessed of wealth given by his father out of (his) pleasure.

" The son of a Brahmin, a Kshatriya, or a Vaisya by a Sudra woman, shall inherit no part of the estate."[6]

Or (in the alternative) the text that he is not an heir means he does not take more than a tenth part.

Manu himself has said:—

" But whether the Brahmin have sons or have no sons by wives of the three first classes, no more than a tenth part must be given to the son of a Sudra."[7].

As to the balance after (deducting) the tenth part, **Brihaspati** says that the wealth of one who is sonless belongs to the sapindas:

1. Manu, Ch. IX, §. 158.
2. Manu, Ch. IX, §. 159.
3. Manu, Ch. IX, §. 160.
4. Manu, Ch IX, §. 180.
5. See above, Manu, Ch. IX, §. 160.
6. Manu, Ch. IX, §. 155.
7. Manu, Ch. IX, §. 154.

Slokas 128-132.

Several kinds of sons.

" An obedient and excellent son of a man having no other male issue, shall receive a maintenance (though he be born of a Sudra woman); let the sapindas take the remainder."[1]

(Now) turning to the subject, he who is born of a twice-born woman lawfully wedded is an aurasa son; this is an appellation with a meaning. Therefore one who is born of the breast is an aurasa. By this, the characteristic of an aurasa is the procreation by oneself. So also Vasishta says:—

" He who is procreated in one's own wedded wife by himself is the first." [2]

" First " means " principal." By that, he is the person principally meant by the term "son." But the Kshetraja and others are secondary. Therefore, by the words "the aurasa is the one born of a Dharmapatni", the characteristics of an aurasa son have been completely mentioned. " His equal," *i.e.*, "equal with the aurasa" is the putrika putra. The appointed daughter herself is the putrika putra. She becomes equal to the aurasa son as she has the characteristics of an aurasa son except his masculineness. Therefore Brihaspati says:—

" Of the thirteen sons mentioned in succession by Manu, the legitimate son of the body (aurasa) and the appointed daughter (putrika) continue the family".[3]

" As in default of ghee, oil is admitted by the virtuous as a substitute (at sacrifices), so are the eleven sons (admitted as substitutes) in default of a legitimate son of the body and of an appointed daughter.[4]"

Even the son of the (putrika) appointed daughter is termed *putrika putra*. Therefore Vasishta says:—

" I shall give thee a brotherless damsel, decked with ornaments; the son whom she may bear, shall be my son".[5]

Gautama:—" A father who has no (male) issue may appoint his daughter (to raise up a son for him) presenting burnt offerings to Agni (fire) and to Prajapati (the lord of creatures) and addressing the bridegroom with these words; " For me be (thy male) offspring." " Some declare, that (a daughter becomes) an appointed daughter solely by the intention (of the father)! Owing to this doubt one should not marry a brotherless bride."[6]

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1. S. B. E., Vol. 33, p. 374. Brihaspati, Ch. 25, §. 31.
2. S. B. Vol. E., 14, p. 85. Vasishta, Ch. 17, §. 13.
3. S. B. E., Vol. 33, p. 375. Brihaspati, Ch. 25, §. 33.
4. S. B. E., Vol. 33, p. 375. Brihaspati, Ch. 25, §. 34.
5. S. B. E., Vol. 14. p. 86. Vasishta, Ch. 17, §. 17.
6. S. B. E., Vol. 2. pp. 301, 302. Gautama, Ch. 28, § 18, 19.

Slokas 128-132 — Several kinds of sons.

Jabali :—" The man who knows Dharma should give away the *putrika* (appointed daughter) after presenting burnt offerings (cooked food) to Agni (fire) and Prajapati (the lord of creatures) as prescribed by the Sthalipaka ceremony. So also while giving away the son (in adoption)".

He who is procreated on one's field (wife) either by a person of the same gotra as that of the owner of the field (wife) or by (other) relative at the direction of the owner, is known as *kshetraja* and becomes the son of the owner of the field (wife).

He who is born of the wife in the house secretly by a father who is not known becomes the son called *Gudothpanna* (secretly born) of him who is the owner of the mother. This (son) is mentioned next to the *kshetraja* because of his being equal to him on account of his being procreated by another on one's wife. He who is born of a maiden who has not been married is called *kanina* ; (he) is the son of the maternal grandfather. So say Manu and others. He too is mentioned next to *gudhotpanna* (the son secretly born) on account of his similarity to him by reason of his being born in the field, more or less his own, in the shape of a daughter.

Vasishta:—" If an unmarried daughter bear a son begotten by a man of equal caste, the maternal grandfather has a son through him ; he shall offer the funeral cake and take the wealth (of his grandfather)".[1]

She who has not been promised by word of mouth is one not given (married): By the (use of the) qualification "not married," a son born of a daughter after promise and before marriage becomes only the son of the person marrying.

Holding the same view,

Manu says:—" A son, whom the daughter of any man privately brings forth in the house of her father, is described as a kanina (son begotten on an unmarried girl) and as the son of the person marrying."[2]

अक्षतायां *Akshatâyâm*—(whose first marriage has not been consummated) means the wife of a hermophrodite, etc., whether a widow or not (remarried). क्षतायां *Kshatayam* (who has been deflowered) means a wife who has been enjoyed by another but who has been again accepted and remarried (by the husband). The person who is born of these is called a *paunarbhava.*

1. S. B. E., Vol. 14, p. 87. Vasishta, Ch. 17, § 23.

2. Manu, Ch. IX, § 172.

Slokas 128-132 — Several kinds of sons.

The remarried woman has been dealt with in the first chapter [1]. All these have been mentioned first owing to their nearness (contiguity) on account of their procreation in a field pertaining to oneself. Those who are not even connected with the field (wife) are mentioned later in the view that they are inferior.

Of them, he who is given either both by the father and mother, or by the father or by the mother with (her) husband's permission, becomes the son called *dattaka* to the person to whom he is (so) given.

Manu :—He, whom his father or mother *with her husband's assent*,[2] being affectionately disposed, gives to another as his son, in adversity (*i. e.*, provided that the donee have no issue)[3] if the boy be of the same class is considered as a son given, *the gift being confirmed* by pouring water". [4]

By pouring water—is (used) as indicating the characteristics of all kinds of gift.

'In adversity' means in famine, etc. In the alternative, an adversity to the donee, *i. e.*, in the absence of a son. 'Of the same class' means—both the donor and the donee being of the same caste. 'Affectionately disposed' means not by fear, etc.

So also " A given son must never claim the family (gotra) and estate of his natural father : the funeral cake follows the family and estate ; but of him, who has given away his son, the funeral oblation is extinct."[5]

Therefore the adopted son shall not take the gotra and wealth of the natural father. He shall not also give the funeral cake. But he shall take the gotra and wealth of the second (adoptive) father and shall give him funeral cake. The funeral cake is illustrative of all the funeral ceremonies.

In the same manner, the son adopted by a man himself (kritrima) the son self-given, and the sondeserted (by his parents) and taken on account of their similarity in characteristics.

After mentioning the thirteen kinds of son, their status has been described in the order of caste in Brahmapurana.

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1. Ch. I, § 67 and commentary thereon.
2. Gloss of Kulluka.
3. Kulluka reads प्रीतिसंयुक्त
4. Manu, Ch. IX, § 168.
5. Manu, Ch. IX, § 142.

Slokas 128-138.

Several kinds of sons.

The given (adopted) son, the son selfgiven ; the son adopted by oneself (without being given by another):the son bought, and the son deserted (and taken); all these shall be supported always (as a duty).

They are of separate gotras, of separate funeral cakes and productive of different families. They partake of three days' pollution in (cases of) birth and death. There is also another son known in the sastras as the *parasava* (caste) who is born of a Sudra woman whose raiment and food are supplied by a Brahmin and connected (with him) either by seed or field and which son acts as his servant. These do not become the sons of Kshatriyas whose vocation is war and destruction aad who are (consequently) consumed by curses. To them (the Kshatriyas) either the aurasa son or the son of the appointed daughter is declared as son. Let it be known that the eleven sons like *kshetraja* and others who are of a separate *gotra* are not declared as sons in their case, though they merely continue the line of ancestors. They perform the *sraddhas* to them (the Kshatriyas) just as a slave would do.

All except the son of concealed birth, the son of a maiden, of a pregnant bride, of the wife begotten by another with leave and of a twice married woman become the sons of a Vaisya. These (excepted) five are avoided even for fear of punishment by the King.

No son is recognized in the case of a Sudra who is of the servile profession, dependant upon others and whose body is subject to the control of others. Therefore he who is born to a slave by a slave is himself a slave.

Vasishta:—"Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause."

"(Therefore) the father and the mother have power to give, to sell, and to abandon their (son). "But let him not give or receive (in adoption) an only son."

"For he (must remain) to continue the line of ancestors."

"Let a woman neither give nor receive a son except with her husband's permission."

"He who desires to adopt a son shall assemble his kinsmen, announce his intention to the king, make burnt offerings in the middle of the house, reciting the Vyahritas, and take (as a son) a person not being his relative and who has himself his relatives close by."

"But if a doubt arises (with respect to an adopted son (who is having his kinsmen away) (the adopter) shall set him apart like a Sudra."[1]

"For it is declared in the Veda, "through one he saves many."[2]

1. Vasishta original is otherwise: It reads as "a not remote kinsman, just the nearest among his relatives" Reads संनिकृष्ट for असन्निकृष्ट.

2. Vasishta ch. 15, § 1 to 7 : S. B. E., Vol. 14, pp. 75, 76.

Slokas 128-132.

Several kinds of sons.

An only son shall not be given. The word "given" is used illustratively. This prohibition applies to sale, etc., also. By parity of reasoning the ceremonies that "the kinsmen shall be assembled," etc., apply to sale, etc., the words "the son shall be taken" being used illustratively. "With relatives not far away" means with kinsmen who do not live far away.

By the relatives not being of a distant place, his (the adopted son's) good descent is likely to be ascertained. Therefore "not remote kinsman" means that a person whose family is known should be taken; and not that he should be taken in the presence of relatives by reason of the realization of that (meaning) from the words "assembling the relatives." असन्निकृष्ट *Asannikrishtam* (not being his relative) means that only a person not related shall be taken. Where a doubt arises as to his caste, *dhurêbhandhavam* (with kinsmen far away) means having relatives who are living at far off places. He shall be kept like a Sudra, till the matter is ascertained. The meaning intended is that the matter should be ascertained (even) with great effort. In this matter, the author (Vasishta) cites a *Sruti* (quotation from the Veda), namely: "It is ordained that through one he saves many":—*i. e.*, through one son, he saves many ancestors. Therefore, the meaning intended is that only a son whose family is known shall be taken; and no other. He who is got by purchase from his father and mother is known as the son named *krita*; while the son named *kritrima* is he who is made a son by a person himself by saying: "You shall become my son." He who gives himself voluntarily saying "I shall be thy son" is the son called *swayamdatta*. He who is born of a woman who is being married (with him in the womb) is called *sahodaja*[1].

Manu:—

"He is called a son bought, when a man for the sake of having a son (*to perform his obsequies*) purchases from his father and mother whether the boy be equal or unequal (*to himself in good qualites, for in class all adopted sons must be equal*),

Equal or unequal is a term used with reference to qualities and not with reference to caste.

"He is considered as a son made (*or adopted*) whom a man takes as his own son, the boy being equal in class, endued with filial

1. Manu Ch. IX, K. 174.

virtues, acquainted with the merit *of performing obsequies to his adopter* and with *the* sin *of omitting them*."[1]

Slokas 128-132.

Several kinds of sons.

Here the reference to equality is with regard to caste.

" He who has lost his parents, or been abandoned *by them* with just cause, and offers himself to a man as his son, is called a son self given." [2]

(Just) cause for abandonment is degradation ; " offers himself" means gives himself up.

" If a pregnant young woman marry, whether her pregnancy be known or unknown, the male child in her womb belongs to the bridegroom, and is called a son received with the bride." [3]

He who is forsaken by his parents for any cause other than *patitya* (degradation) and taken by another, becomes the son deserted (*apaviddha*) of the person (so taken).

Manu :—

" A boy whom a man receives as his own son, after he has been deserted *without just cause* by his parents, or by either of them, *if one be dead*, is called a son deserted ."[4]

S. SRINIVASA AIYAR.

(*To be continued*).

NOTES OF INDIAN CASES.

Arakal Joseph Gabriel *v.* **Domingo Inas**:—I. L. R. 34 M. 80.—We have doubts about the correctness of the conclusion adopted by the learned judges in this case. The reasoning of the learned judges can also hardly be justified. We have the high authority of the Privy Council to say that the rule of joint tenancy is an extremely technical rule of English conveyancing—*Jogeswar Narain* v. *Ram Chandra Dutt.*[5] There can, therefore, be no justification for applying circumstances of this kind unless there is statutory authority or a course of decisions compelling judges in this country to adopt this extremely technical rule. Even in England this rule is regarded as of a highly technical character and English courts (especially) took considerable

1. Manu, Ch. IX, § 169.
2. Manu, Ch. IX, § 177.
3. Manu, Ch. IX P. 173.
4. Manu, Ch. IX, § 171.
5. (1896) I. L. R. 23 C. 670 at 679.

"latitude in construing a tenancy in common without the words equally to be divided on the foot of the document."

English Courts of Chancery which looked upon the right of survivorship in odious terms construed against joint-tenancy to prevent the hardship and injustice resulting from the right of survivorship which was essentially involved in the doctrine of joint-tenancy. The principle upon which this presumption was made by English Law is thus stated in CRUISE'S *Digest*, Vol. II, Title of Joint-Tenancy page 431. "But where lands are granted to two or more persons, to hold to them and their heirs, for term of their lives, or for term of another's life, without any restrictive, exclusive, or explanatory words; all the persons named in such instrument, to whom the lands are so given, take a joint estate, and are called joint-tenants. For the law will interpret a grant of this kind so as to make all its parts take effect, which can only be done by creating an equal interest in all the persons who take under it." If this is the principle, we can hardly understand why there should be a presumption in favour of joint-tenancy when effect can be given to the principle by construing the grant as creating a tenancy in common.

It is said by the learned Judges that the English rule as to presumption of a joint-tenancy is adopted by the Indian Legislature in the illustration to S. 93, of the Indian Succession Act. It must be observed that there is no section in any Indian Statute (either in the Transfer of Property Act, which deals with transfer of property, or the Succession Act, which deals with the rule as to the construction etc., of wills) adopting the English rule. If the Legislature had intended that the English rule shouldapply, it would have been easy to say so in any of these Acts S. 93 of the Succession Act, has no bearing whatever upon the question. That section does not say that a legacy given to two persons *simpliciter* is a legacy to the two jointly. All that it enacts is that if a legacy be given to two jointly and one of them dies before the testator, the other legatee takes the whole. S. 93 applies to a case where obviously no interest has vested in any of the legatees. It is a well-known principle in the construction of statutes that illustrations cannot override the sections and that the illustrations should be given up if the plain language of the section compels us to do so.

In the present case, all that can be said is that the legislature which was concerned with the passing of the Act X of 1865, thought that in their view a legacy to A and B would be a legacy given to two persons jointly within the meaning of S. 93. They were not enacting as law that a legacy of that character should be construed as creating a joint-tenancy as known to the English law. We have known it to be a principle that the law of wills follows the law of gifts. In the case of a gift the interest vests from the moment of the gift whereas in the case mentioned in the illustration no interest is vested in the legatees who die before the testator. The principle mentioned in the section and exemplified by the illustration can hardly apply, if the case were one of gift.

The learned Judges seem to think that the Legislature by the illustration created a rule of presumption in favour of joint-tenancy and upon this view proceed to state that its non-extension to the case of gifts should be shown by those who so assert. We have already stated our view that the Legislature cannot be said to have laid down any rule of presumption in the case of devisees so as to be binding upon the courts in this country. Unfortunately there is no report of the contents of the document which has been construed by their Lordships in this case. Reliance was placed by the appellant's vakil upon a clause in the gift which provided for the handing over of the possession of the property by the guardian as each child attained majority. The exact terms of the clause are not given and so it is difficult to say what is the proper construction to be placed upon the clause.

But if each child should be placed in possession as each attained majority, possession could only be given to each of his share, and if possession was to be given to both of them on attaining majority that might be different. The clause as to handing over possession as each attained majority would seem to show that the intention was to divide the estate and to create a tenancy in common.

Again, the document is only in the vernacular, and in all vernacular conveyances it is usual to insert a clause that the donees should enjoy the property hereditarily. If the gift is to A and B and their heirs, then according to the English law the heirs of both will be entitled to take. There may be a joint estate for the lives of the

donees but on the death of the survivor the heirs of the two donees will be entitled to take equally. This is clear from the following passage in Littleton:—

"If lands be given to two men, and to the heirs of their bodies begotten, the donees have a joint estate for term of their lives, and yet they have several inheritances. For if one of the donees hath issue and die, the other which surviveth shall have the whole term for his life: and if he which surviveth also have issue and die, then the issue of one shall have one moiety, and the issue of the other the other moiety; and they shall hold the land between them in common; and are not joint-tenants, but tenants in common. And the cause why such donees have a joint estate for term of their lives is, for that at the beginning the lands were given to them two; which words, without more saying, make a joint estate to them for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them, as a man and a woman may, the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift and this is, to the heirs which the one shall beget of his body by any of his wives; and to the heirs which the other shall beget of his body by any of his wives; so as it behoveth by necessity of reason that they have several inheritances."

Secretary of State for India *v.* Muthu Veeranna Reddy—I. L. R. 34 M. 82.—We can hardly regard this decision as satisfactory. If under the common law of India there is a duty imposed upon the Zemindar and the Government to keep tanks in proper repair and by virtue of that duty the law confers upon them certain rights and powers, it seems unreasonable to hold that the failure on their part to discharge their duties is not actionable. Whatever view may be taken as to the position between the Government and the ryot—whether the duty of the Government to supply water for purposes of irrigation rests upon the so called Indian common law or upon contract—it is certain that there is a legal duty on the part of Government, and this breach of the duty must surely be actionable. The damages to which the ryot will be entitled will be the loss sustained by him by reason of the breach of duty by the Government.

Apart from any defence which may avail to the ryot when sued for rent or kist this loss will be the profit which the ryot will have earned by raising the usual crop, that is, the value of the crop minus the expense of cultivation and the Government kist payable on the land. We think the claim for damages is upon principle unanswerable and the fact that no cases have come before the courts involving a claim such as the present can be no answer to the plaintiff's claim. In fact there are many reasons why such a claim may not have come for adjudication. Ryots in this country and people in general will rather submit to the inevitable than think of suing the Government. Secondly, it is only by recent cases that the claim of the Government to make repairs or to construct irrigation works or to distribute water has been placed on a high pedestal so as to conflict even with the rights of ordinary persons.

This case goes to the farther extreme and its effect is to give absolute discretion to the Government without even a remedy for the ryot on whose behalf this right is said to have existed when by reason of the Government's default loss ensues to the ryot.

If there is only a right without a corresponding duty in favour of the person for whose benefit this right is conferred, the decisions which go to the length of holding that the right can be exercised so as to override the rights of others can hardly be justified. We shall refer to this question later on.

Venkatasawmi Pillai *v.* Suppa Chetty—I.L.R. 34 M. 90—We doubt whether the construction placed by the learned judges upon S. 17, Cl (*d*), of the Registration Act is correct. The lease in this case was for 3 years and the rent fixed was a consolidated amount of Rs. 54 and 10 bundles of betel leaves. It must be admitted that it comes within the clause as being a lease for a term exceeding one year. Unless exemption is claimed under the proviso, it is clear that registration is necessary. The person who claims the exemption must show that his case comes under the proviso, and if he cannot show that, he cannot have the benefit of the exemption. In order that the proviso may apply two conditions have to be satisfied : *first*, the term of the lease should not exceed five years, and *secondly*, the annual rent reserved by the lease should not exceed Rs. 50.

The proviso obviously does not apply to a case where the lease has not reserved an annual rent. The proviso only applies to leases of a certain character. This is clear from Cl. (*d*) which says that a lease reserving a yearly rent merely is compulsorily registrable. In order that the proviso may apply to such leases the proviso states expressly that the annual rent reserved should not exceed Rs. 50. The learned Judges seem to think that, if no annual rent is at all reserved and the term is less than 5 years, the lease will fall-within the exemption. This was merely begging the question they had to decide and we should think it clear upon the construction of the clause and proviso that such a lease was not within the exemption.

While a consolidated lump sum is to be paid in advance or is to be paid on a certain day it is absurd to suppose that there is a reservation of annual rent when there is no intention on the part of the parties to reserve a yearly rent. The learned Judges next suggest a difficulty in a case with reference to which no difficulty can arise. They say, "suppose the term is any period less than 5 years and one consolidated rent is fixed at a thousand rupees, are we then at liberty to hold, because there is no annual rent, that the annual rent reserved does not exceed Rs. 50?" The learned Judges imagine a difficulty in the case thus stated by them and abstain from solving the same.

Of course the view taken by the learned Judges gives rise to all these difficulties. Upon the view that we have suggested as to the construction of the proviso, and that has been adopted by Mr. Justice *Miller*, there can be no doubt that in the case suggested the lease although for 5 years does not come within the proviso as the second requisite is not satisfied *i.e.*, as no yearly rent reserved at all.

SUMMARY OF ENGLISH CASES.

Campbell *v.* Paddington Corporation.

[1911] I. K. B. 869.

Public nuisance—Obstruction of view—Pecuniary loss—Damage.

Plaintiff had a good and uninterrupted view from the windows of her house of a certain public road along which a public procession was announced to pass. Certain persons

agreed to take and pay for seats on the first and second floors of the house to see the procession. The defendants, a borough council, in pursuance of a resolution ordered the erection of a stand in that part of the road where plaintiff's house was situated. This stand was a public nuisance and it completely obstructed the view of the road from plaintiff's windows. The persons who agreed to take and pay for seats asked to be released and plaintiff had to release them from the agreement. In an action by plaintiff to recover damages for wrongful interference with her right and for loss caused by the unlawful act of the defendants—*Held* that the plaintiff was entitled to recover as damages the benefit which she would otherwise have enjoyed.

Rex *v.* Garret-Pegge: Brown *Ex parte.*
[1911] 1 K. B. 881.

Justice of the Peace—Summary jurisdiction—Issue of summons without seal—Defect in form; effect of—Summary Jurisdiction Act.

Section 1 of the Summary Jurisdiction Act provided "that no objection shall be taken or allowed to any summons for any alleged defect in substance or in form." A certain person was charged before a Justice of the Peace with an offence punishable under the Act. An instrument which bore no seal but was in all other respects sufficient under the rules as a summons was issued by the Justice and served on the person charged. He appeared before the Justice and objected to the jurisdiction. The objection was overruled and he was convicted, and a *rule nisi* having been obtained to quash it, it was *held* that absence of a seal was only a defect in form under the Act and the conviction was good.

In re **Anderson.** [1911] 1 K. B. 897.

Bankruptcy—New Zealand—Domicil—Personalty in England—Subsequent bankuptcy in England—Title of Official Assignee, New Zealand—Priority—Notice to settlement trustees.

A debtor who was entitled to a reversionary interest in personalty in England and whose domicil was English was adjudicated bankrupt in New Zealand in 1898. The reversionary interest by oversight was not included in the assets of the bankrupt. In 1904 the debtor was adjudicated bankrupt on the petition of

some creditors in England. The Official Trustee in England discovered the fund and gave notice of his right to the trustees of the settlement : *Held* that the Official Assignee in New Zealand was entitled to the fund even though he had not given notice of his title to the trustees of the fund.

Lurcott *v.* Wakely & Wheeler.

[1911] 1 K. B. 905 (C. A.)

Landlord and tenant—Lessee's covenant to keep in thorough repair and good condition—Construction—Liability of lessee.

A lessee of a house covenanted to substantially "keep in thorough repair and good condition" the demised premises and to deliver the said premises being so repaired and kept at the end of the term. The reversion of the house was assigned to the plaintiff and the unexpired portion of the lease to the defendants. Shortly before the close of the term the County Council gave notice to the plaintiff to remove a certain wall as being dangerous to the public. The plaintiff called upon the defendants to comply with the notice which they refused to do. The plaintiff after the expiry of the term demolished the wall under orders of a Magistrate and rebuilt the wall. The house was old and the wall was decayed by age, and the wall could not have been repaired except by rebuilding. *Held*, in an action by the plaintiff to recover the cost of repairs, that the defendants were liable to pay the cost of taking down the wall and rebuilding it.

Riddel Brothers *v.* E. Clemens Horsted.

[1911] 1 K. B. 934(C. A.)

Sale of goods—C. F. I. cantract, terms net cash—Payment against shipping documents—Not included—Construction.

Where a contract for the sale of some goods to be shipped from thePacific Coast to England provided that the buyers should pay for the said goods at a certain rate " C. F. I. to London etc. terms net cash" and there was no provision for payment against shipping documents: *Held*, in an action for breach of the contract, by *Vaughan Williams* L. J. and *Farwell* L. J. on a construction of the contract (*Kennedy* L.J. dissenting) that the buyers were not bound to pay on tender of the shipping documents but were

entitled to refuse payment until inspection on arrival of the goods.

Decision of *Hamilton* J. reversed.

Rex *v.* Bates. [1911] 1 K. B. 964 (C. C. A.)

Criminal law—Prosecution—Consent of Attorney-General not obtained—Jurisdiction.—No substantial miscarriage of justice—Explosive Substances Act—Court of Criminal Appeal Act, 1907.

A certain person was charged with an offence under the Explosive Substances Act and convicted. The consent of the Attorney-General, which was necessary to the prosecution, was not obtained. *Held*, on appeal by the prisoner, that the failure to obtain the consent of the A.-G. deprived the court of any jurisdiction to try, that the Court of Criminal appeal had no power to deal with the case, and that the conviction should be quashed even if there was no substantial miscarriage of justice.

Simmons *v.* Liberal Opinion, Ltd.: Dunn *In re.*

[1911] 1 K. B. 966 (C. A)

Costs—Solicitor conducting defence—Implied warranty of authority—Defendant unknown or non-existent—Solicitor personally liable.

A solicitor must be held to warrant the authority he claims as representing his client and as such personally liable for the costs of the other party if it is proved that the client for whom he is supposed to act is unknown or non-existent.

Roles *v.* Pascall & Sons. [1911] 1 K. B. 982 (C. A.)

Employer and workman—Compensation—Failure to give notice—Ignorance of existence of Act—Reasonable cause—Workmen's Act, 1906.

A workman who was injured in the course of his employment failed to give the requisite notice for compensation within the time limited by law. *Held* that ignorance on the part of a workman of the existence of the Act and of his right to any compensation for injury arising out of his employment is

neither a "mistake" nor a "reasonable cause" for not giving notice as required by the Act.

London County Council *v.* Fairbank.

[1911] 2 K. B. 32.

Hackney carriage—What constitutes keeping—Revenue—Licence.

Where the Inland Revenue Act made all persons who kept a greater number of carriages than they were authorised under the license liable to a penalty, it was *held* that a cab-owner who had a large number of spare cabs ready and intended to be used could not be said to keep them until he should actually use the cabs.

Rawlins *v.* Fisher. [1911] 2 K. B. 93.

Foreign judgment—Criminal prosecution—Damages—Decree for—Enforceability.

According to the French law an injured person may intervene in the prosecution of an offender and put in a claim for damages. The Judge may try this claim along with the charge for causing injury and award damages when punishing the accused for the offence. *Held*, in that case the judgment is severable and that portion awarding damages may be enforced in an English Court of Law and that the rule of International Law prohibiting Courts of Justice from executing penal judgments of Foreign Courts does not apply.

Times Cold Storage Co. *v.* Lowthes Blankley: Lowthes Blankley *v.* Times Cold Storage Co. & New Zealand Shipping Co.

[1911] 2 K. B. 101.

Practice—Adding party—Counter-claim—Alternative cause of action—County Court Rules, Order X, r. 22.

A defendant cannot, under Order X, rule 22, join a person as defendant to a counter-claim against whom he alleges he has an alternative cause of action, for it will seriously embarrass the plaintiff in the action and possibly deprive him of his just rights against the defendant.

_In re_ Kitson : _Exparte_ Thomas Sugden & Son, Ld.

[1911] 2 K. B. 109.

Administration—Bankruptcy—Creditor of deceased debtor—"Person aggrieved"—Appeal by.

Some creditors of a deceased person took out summons for the administration of his estate in the Chancery. Some other creditors who supplied goods to the executrix of the deceased person on the same date presented a petition for the administration of the estate of the deceased in bankruptcy and an order was made accordingly. *Held*, on appeal by the former, that they were aggrieved parties and hence had the right of appeal under the Bankrupty Act and that the latter were not creditors of the deceased and consequently the order for administration in bankruptcy made on their petition was without jurisdiction.

Barker _v._ Arnold. [1911] 2 K. B. 121.

Criminal law—Examination of defendant—Question of pervious conviction disallowed—Validity of—Conviction—Criminal Evidence Act.

The Criminal Evidence Act protects accused persons against being obliged to answer questions tending to show previous convictions. A certain person was charged with an offence and he gave evidence on his own behalf. The solicitor for the complainant put questions as to an alleged previous conviction and the Justices disallowed the question. The solicitor, however, remarked that he had a certified copy of his conviction. The Justices convicted the accused stating that the question and the observation were ignored. *Held* that though the question should not have been asked the conviction was good as the Justices were not influenced by it.

Armorduct Manufacturing Co., Ltd.

v.

General Incandescent Co., Ltd.

[1911] 2 K. B. 143 (C. A.)

Company—Judgment-debt—Execution—Voluntary liquidation—Delay in execution obtained by trickery—Leave to execute.

The plaintiffs obtained a decree for a certain sum against the defendants and plaintiffs' solicitor wrote to the defendant company's solicitor to send his clients' cheque for the sum due. The plaintiffs' solicitor was given to understand by the solicitor for the defendants and one of their directors that a cheque for the decree amount would be sent shortly and consequently the decree was not executed then. But on the same day of the receipt of the letter a notice was sent out convening a meeting for passing a resolution for the voluntary liquidation of the defendant company on the ground of inability to pay its debts. The meeting was held on a subsequent day and the resolution was passed. On that date the amount not having been paid the plaintiffs proceeded with the execution. *Held* that the plaintiffs were prevented from executing their decree by the trickery of the defendant company and the other creditors are not entitled to take advantage of the wrongful act of the defendants and thus deprive the plaintiffs of their just rights.

JOTTINGS AND CUTTINGS.

Is the Lawyer a Parasite?—A man in a recent conversation with the editor declared that actors, ministers and lawyers were parasites and had no right to exist. He claimed that these three classes of men preyed on their fellows, that they were unnecessary, that they had no real value to give in return for the money they received.

We did not agree with him.

The Law Student's Helper holds no brief for the actors and the ministers. They are abundantly able to look after their own interests. But we do feel that it is our duty to say a word in defence of the lawyer.

Is the lawyer a parasite?

Does he give real value for the money he receives?

Is he a necessary cog in the machinery of the nation?

A parasite, broadly defined, is something or somebody who lives on something or somebody else at its expense without returning an equivalent of any kind.

First, does the lawyer live on somebody or something else?

Without doubt he does, just as the doctor, the clergyman, the actor, the politician, do. He lives on his community. He gives it

nothing tangible as the farmer or the merchant does, but it gives him a living, sometimes, usually, in fact a better living than the merchant or the farmer. Yes, the lawyer lives on something.

Does he live at its expense?

It is equally true that he lives at its expense. It gives him a living, necessaries, even luxuries. He costs the community money. He is an expense to it.

So we see that two parts of the definition of a parasite apply to the lawyer. It makes the argument run strong against him, does it not?

But wait. There is a third element in the definition, and an element which, if lacking, removes the lawyer from the defined class. He must conform to all three portions to be a parasite, but more than all he must come within the last section to which we are about to call your attention.

Does the lawyer return an equivalent to the community for what it gives him?

There you are. We have now come to the point where real argument begins.

Does the lawyer give anything to the community?

It is perfectly plain that he does give his services, his labor. Therefore the question arises, does his labor offer an equivalent to the community for its favors to him?

Economists tell us, or ought to tell us, that the value of any commodity depends upon the labor that is necessary to produce it. Other elements enter, of course, but the labor is the primary item. One article is very valuable because it takes great labor to produce it; another is equally valuable because it requires specially trained labor to produce it. Some articles are cheap because a great quantity of them can be produced with very little work.

Let us take an example. Potatoes are cheap. They can be bought for very little money because so great a bulk of them can be put on the market without the expenditure of a great deal of labor. On the other hand, an automobile is costly because much labor, both ordinary and skilled, goes into it before it can be offered to the public. In comparison with the materials that go into the machine the labor is very great. It is the principal part of the cost of production.

Nothing can be produced without some labor and nothing has a value until some labor has been put upon it. Therefore labor is the most necessary commodity in the world.

Labor, as we said above, is the basis from which all value should be figured. Perhaps this is socialistic; if it be so then in so much the socialists are right in their theory.

We have now reached the point where we are able to say that the lawyer has to offer a necessary commodity, his personal services. He has no stock in trade possibly, but neither has the digger of ditches, the common laborer without whom civilization could not exist.

However, our opponents will say at this point that there is a great difference between the value of services, and that some labor is not labor at all in the sense that it is of value. For instance, to blow soap-bubbles requires a certain amount of expenditure of effort, nevertheless it is valueless to the community. Other labor is necessary, valuable, but not costly. An instance of this is common labor such as is necessary in the grading of a street or the digging of a cellar. Still other personal services are to be had only at a great price because of their high utility and special value to the community. An instance of this sort is the highly trained engineer whose mind conceives and whose executive ability carries out the construction of a wonderful bridge or marvellous tunnel. This difference in the value of services is too evident to need further examples. Some effort is worth much, some little and some nothing.

Now, then, to demonstrate that the lawyer is not a parasite, that he does not fall within the third requirement of our definition as he does under the first two, we must show that his services are valuable, necessary, worth the payment which he receives for them.

To answer this we must glance at the structure of society for an instant.

Long ago the family was the social unit. The head of the family was the legislature, judiciary and executive in one. He made his own laws, interpreted them and saw to it they were obeyed. In this unit a lawyer would have been unnecessary, there would have been nothing for him to do, and without doubt if he had come before the head of the family with a brief for an offender he would have received the opinion of the court from the knob end of a war-club.

After the family came the tribe, which in various parts of the world and among various people was more or less patriarchal. The headman or chief was the executive and judiciary if not the law-maker. Sometimes he was all three. At any rate he interpreted existing law and executed it. In this combination the lawyer had no place,

first because of the smallness of the community which enabled all to appear in person and set forth his case ; second because in that simple form of society few and simple rules of law existed which needed no interpretation, only application. For instance, if one man slew another the law said he should pay to the dead man's brother so many cattle as a reparation. It was a simple rule and needed little interpretation. Anybody could do it, and if the head of the tribe failed, the dead man's brother was usually able to see to it that he got a justice satisfactory to himself.

But today we have advanced far beyond this point. We live in a highly complex society, surrounded by a multitude of laws and forms. Where one headman represented the governing power for a few hundred tribesmen, today there are few governments which do not number their citizens by the million.

We have divisions of the sovereign government, we have divisions of local government, and each has its rules and laws. We have a multitude of trades and professions, and with each exist rules and laws. It is necessarily so.

If every act were not controlled by law in so great and complex a system as ours, anarchy and mad confusion would result. There must be a law for everything and everything under its law.

This point could be discussed at great length, but it is not essential because every reader knows that a multitude of laws exist and that this multitude of laws are necessary in greater part.

Now then, what services does the lawyer render to the community, and what have they to do with the complexity of our laws?

We have granted that the laws are necessary, and that it is necessary to have them in the great quantity and complexity in which they exist.

We have granted, too, that every citizen must conform to these laws and be governed in his actions and transactions by them.

Now, no citizen can know all the law. If he be in trade or business his time is taken up with the conduct of his own affairs, with the mastery of the details of his calling, and he has no time to learn the general principles nor to keep abreast of the changes in the law. Yet he must conform to it.

If he be a grocer he must carry on his business legally. He must act in such a manner as to protect himself in his interests. He must act in such a manner that he shall not take advantage of

his customers. Yet he knows only the grocery business. He has had time or opportunity to learn little else.

How then is he to proceed with safety?

Evidently he must apply for guidance to some one who can direct him truly.

Who can direct him truly?

Only a man who has given his life to the study of the law and the mastery of its principles. In other words, a lawyer.

In every community there must be men who understand the law, its principles and its machinery, or the citizens will be deprived of its benefits and protections.

Undoubtedly the most essential thing in any nation is law. Without law the nation cannot live; without the shelter of the law no citizen would be safe. This is beyond disputation as is also the fact that a community which has law but does not know what it is or how to operate it is as badly off as that one which has no law.

Therefore there must be men specially learned in the law, men who know how to apply it to instances which arise, men who can protect the citizens from mistaken breach of rule or set the machinery of the courts in motion to gain redress for wrong.

The lawyer is the go-between connecting the law of the land with its citizens. His is the conduit through which it runs from reservoir to consumer to use a clumsy figure of speech, or suppose a man be dying of thirst and near him is a tank full of clear water whose contents he cannot reach because he is unable to turn the spiggott that will release the stream. This is the condition of the community which has law but does not know how to apply it. Somebody is necessary who understands the workings of that spiggott, which represents the court, or the man will die of thirst. Somebody must understand the law and its application and how it may be had from the courts, or the community will go lawless.—*The Law Student's Helper.*

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HONEST LAWYER, NOT SHYSTER, DEMAND OF THE PRESENT.—*Judge Curtis D. Wilbur says: Field of the Attorney is constantly widening, and that knowledge of law fits man for many lines of business activity.*—"Do you think it right for a lawyer to defend a man he knows to be guilty?" This question, one of the first asked by the young man and his parents when the field of the law is under consideration, shows how little the legal profession is understood by

the laity. This question does not at all lie at the foundation in considering entering into the study of law.

Comparatively few lawyers, less than one-tenth, make a practice of criminal law. But because of the fact that criminal cases contain more of the human interest than the average civil case, the public hears more of the cases tried by one criminal judge than of the cases tried by the ten or eleven civil judges. It hears of the case when the crime is committed; it follows up the story of the arrest, the preliminary examination, and so in the public mind the criminal law occupies a very important field, and the question is therefore natural to be asked by the conscientious young man who is considering taking up the practice of law.

The profession of the law is rapidly changing. In the complexity of modern affairs, the organization of great trusts, the modern system of merchandising, the enactment of county, municipal, state and federal legislation to meet abuses that are going on in various directions; the gathering together of citizens in large communities; the world-wide commerce; the problems of transportation and transportation companies; the enactment of laws for the protection of great masses of wealth in the hands of insurance and trust companies; constant change of legislation, of city charters, of state constitutions, the increasing scope of federal legislation; the establishment of new courts; the enlarged scope of municipal activities, evident, locally, by the construction of the $ 23,000,000 aqueduct, with its corollary cement plaint and power proposition; the improvement of harbors, in which county, city, state and nation are all interested, all furnish a new and ever-increasing field of activities for the lawyer.

Not only is the field exclusively occupied by the lawyer a constantly increasing one, but the officers of great trust companies and banking companies, the large real estate dealers, are many of them lawyers; men who do not practice law, but who, because of their knowledge of law and affairs, are peculiarly fitted for the work laid out for them in business lines. The young man in contemplating the study of law will do well to take into consideration the fact that a knowledge of the law prepares him for many lines of business activities, as well as for the legal profession, the judicial, legislative and executive offices in government.

Men who have listened to converted lawyers testify in rescue missions and Salvation Army meetings that they were compelled to abandon the practice of law in order to live Christian lives might

well be disturbed. It is no doubt true that these men did have to abandon the professional law, for a man may practise law just as he may do business, in such a way that in order to be honest he must quit the law or the business. In fact, there is no room in the law for a dishonest lawyer. The interests of his client are too precious to be committed into the hands of a dishonest person.

His opportunities for doing wrong are too great to be confided to a dishonest man, and so it is as essentially true that above all things a lawyer should be honest.

But, returning to the question first asked, "Can an honest lawyer defend a guilty man?" Inasmuch as clients choose their own lawyers, the question might rather be put in this form: "Will a guilty man choose an honest lawyer to defend him?" But, in analysing the question, it should be noticed that the very matter to be tried is whether or not the man is guilty, and, of course, of what is he guilty. Cannot an honest man honestly assist in the investigation of this question?

A man has killed another. He is guilty of the killing. But in law he may be perfectly innocent of crime. He may be insane; he may have acted in self-defence; or, if guilty of crime, he may have been guilty of one of a number of crimes. He may have been guilty only of manslaughter, killing in the heat of passion; or the killing may have been the result of negligence or carelessness, and be manslaughter with no intent upon the part of the killer to do wrong. Or he may have been guilty of murder in the second degree; or murder in the first degree. In the latter case, a lawyer might well defend the criminal in an effort to secure a verdict from the jury which meant life imprisonment, rather than hanging. So there is a field for an honest man in the defence of a guilty man.

It is popularly supposed that criminals who engage lawyers confide to those lawyers the inmost secrets of their hearts. I believe that this is not generally true, but ordinarily the men who are guilty of serious crimes—of murder or burglary—deny their guilt to their attorneys; and many a lawyer whose client has been convicted of crime is still persuaded that a great injustice has been done an innocent man.

Can wrong be right? This question answers itself. It, therefore, can never be right for a man in the defence of a criminal, or in representing his client, in any case, to do wrong in order to further the ends of his client. It cannot be right for him to lie, or to assist he client in lying. It cannot be right for him to steal, or to assist

his client in getting away with the fruits of theft. It is as wrong for a lawyer to do wrong as it is for anyone. Perhaps more so, because he sins against the light.

The demand of the day, in governmental fields, in legislative fields, in the trial of cases, in the management of great trust funds, is for the honest and upright lawyer. There is no longer a place in the law for the shysters and the tricksters. Courts are more and more looking at the question of ultimate justice, and the executive, legislative and judicial bodies are all striving more and more to bring about that which is right between man and man, regardless of fixed rules of procedure or philosophical reasoning, based on arbitrary rules.—*Los Angeles Herald.—The Law Student's Helper.*

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What One has to Learn to be a Lawyer.—When a boy begins to think about choosing his serious vocation in life he finds very little definite information to help him in making the choice. Most of us waste a lot of time before we hit upon the occupation for which we are best fitted. This is often unavoidable, but in the case of the professional man there is very little time to waste. The purpose of this article is not to draw men into a somewhat crowded profession by extolling the glories of a life at the bar, but to show those who are thinking of becoming lawyers some of the difficulties they will encounter, with hints for overcoming them. And when I say, "those who are thinking of becoming lawyers," I mean lawyers who intend to practice their profession. I have not the space to speak of the law as an asset to the business man or the politician.

First, what are the natural qualifications that a lawyer should possess? Conversation whith those who are preparing men for the bar shows that the lay mind is permeated to an absurd extent with the mistaken idea that the argumentative boy is cut out by nature for a jurist. "I receive letters from fond parents almost every day," said the dean of one large law school, "telling me that their sons will make fine lawyers because they are always arguing. There never was a greater mistake. These people think that a lawyer spends his time disputing in a court room. As a matter of fact, even court lawyers, who are a very small part of the legal profession, do about four-fifths of their work outside of court.

Remembering then that the mere fact that you are fond of contradicting your elders, and that you sustain your contradictions with aggressiveness and skill, does not necessarily signify that you will one day be a member of the Supreme Bench. Let us inquire

into some of the things that are really essential to the successful lawyer. The authority just quoted gave as the mental attributes the lawyer should possess, "the power of clear logical thinking, with the intellectual grasp that enables one to take in many sides of a situation readily, and to distinguish between problems which look alike but are not; a keen sense of justice, and enough common sense to know instinctively, at least in a general way, what is right for a man to do and what is wrong."

A writer in a legal periodical says : "The law is an intensely intellectual profession, and the successful study of our jurisprudence requires the mastery and control of one's intellectual processes, and the development of one's reasoning faculties, to a degree that is ordinarily attained only after long disciplinary study." Thus we see that success at the bar rests upon something more solid than an unwillingness to admit oneself in the wrong and an ability to give to the wrong the semblance of the right.

Accepting the idea that the law is a scholarly profession, how shall we prepare for it ? There are two roads open. You may prepare for your bar examination either by attending a law school or by "reading" law in an office. The former method is preferable and today about seventy per cent of our lawyers come to the bar by way of the schools. In many cases, however, the latter method is the only practical one. It is a good one too, under proper conditions, and it will be discussed later.

For those who can do so it is advisable to take a college degree before entering the law school. The Harvard and Columbia schools demand this. Some of the other institutions require two years, others one year of college work, and the rest simply enforce, in a more or less scrupulous fashion, the presentation of some proof of a high school education or its equivalent. The law school course usually covers three years. There are some schools in the South which offer a two years' course but although they have some warm defenders, all that can be said in favour of the short course seems to be greatly offset by the fact that there is much talk among the larger schools of lengthening the course to four years.

A quotation or two from the writings of legal educators will explain why a college decree is preferable. We find this in the article just quoted: "The law teacher realizes, more keenly probably than any one else, because his attention is constantly challenged to the fact, that, as a rule the strongest students in law are those who had an extended and systematic preparatory training." Another

writer says: We take it to be conceded, at least among our brethren, that there is no profession or calling which requires a broader, deeper fundamental knowledge than the profession of the lawyer. The various and diverse phases of life with which it deals necessarily require this for the successful practitioner, so that today there is a universal demand and a general trend among the law schools of our country requiring a broader fundamental knowledge, and a higher mental training on the part of the student who desires to pursue the law course."

The belief has been expressed that it does not make any difference what the boy who intends to enter the law school studies in college, as long as he gets the mental training that comes from following any systematic course of study. It seems to be the more general opinion, however, that a knowledge of certain definite subjects aids materially in the study of law. Most of these would almost surely be included in any well-rounded college course, so that the boy who goes through college before entering the law school gets his mental training and his useful knowledge together. But for the boy who has only the time and money to go through the high school or at most to spend a year or two in college, all the knowledge he can acquire which bears either directly or indirectly on the study of law, becomes doubly important.

To understand the law one must know something of its historical development. The law is not a set of rules written out in statute books which can be learned and applied like mathematical formulæ. It is a living thing that is subject to change like all living things. In order to understand it one must be familiar with the processes of change and development through which it has passed in arriving at the point where it is to-day. A lawyer who knows simply the law of the community in which he practises is like an engineer who knows his formulæ by rote but knows nothing of the mathematical principles involved in their derivation. But just as it is impossible for an engineer to carry all the necessary formulæ in his head, it is impossible for the lawyer to carry in his head the whole body of law that he is called upon to use. Both have their books to fall back upon and both are helpless without them, while the lawyer who understands the principles upon which his formulæ have been built up, can construct the law or the formulæ in an emergency. At best the man who knows only rules can approach the likeness of a machine which is useless if one of its parts is lost. The man who knows principles can learn the rules with less effort, and if he lose one

of them he is no whit dismayed for his mind is stored with resources for meeting such a contingency. To be successful a lawyer must be resourceful. The law is not an exact science like mathematics; it is more subject to change, and for this reason it is all the more important that you who intend to use it should understand its principles so that you will not gape stupidly if a rule is wiped away and even your books do not give you the new one.

And as we have said, these principles can only be understood in the light of their historical development. In an address made as President of the Association of American Law Schools, Prof. W. P. Rogers said: "The development of civilization and the advance of civil government are so interwound with the growth and development of the law, that in pursuing either, one cannot avoid the other, and the student who has completed a course in history is delighted and charmed later with his legal studies, when he discovers himself frequently crossing and traversing familiar path." You who wish to be a lawyer cannot acquaint yourself too thoroughly with history—particularly social and constitutional history.

The so-called "common law" which is the law of all but one of the States of the Union, is based upon the common law of England, which in turn goes back to Roman law for its inception. Thus we may narrow down the most important part of our programme of historical study to that which deals with Rome, England and the United States, as far as it is possible to study the history of one of these without reference to that of neighbouring civilizations.

Probably the subjects of next importance in leading up to the study of law, are economics and social and political science. At least an introduction to these studies is found among the courses provided for the freshman or sophomore year in most colleges, but they are seldom taught with anything like adequacy in the High School. It is for the student who must combat the disadvantage of not having a college education, to gain by private study as thorough an insight into them as possible.

Attention to the art of written and oral expression cannot be too strongly urged. The former is necessary to all lawyers. The latter is necessary to some, and is a useful accomplishment to all. To quote Professor Rogers once more: "We should all agree that one cannot take too much of what is generally designated as the course in English for the lawyer who can use with fluency and accuracy the words of the English anguage is well equipped for the law though he may be ignorant of other languages." Of oral expression

he says : "And to every young man who contemplates a life at the bar, I would say, miss no opportunity to cultivate this art. Take advantage of every occasion which gives you a chance to think and talk in public."

As accuracy is one of the pre-eminent requirements of the legal practitioner, mathematics, and other studies which induce it, are of great importance as mental training. When you present a case or draw up a brief the watchful adversary will take advantage of any inaccuracy on your part, and you should begin early to cultivate that sureness in your work that will come at first only with conscious, methodical painstaking, but which in time will become a habit of incalculable value to you.

There have been so many good lawyers in this country who never saw the inside of a law school, that it is impossible to ignore the law office as a place to prepare for the bar examinations. But never think that because you do not have to present a certificate to enter an office that you can afford to neglect the preparatory study that the certificate stands for. On the contrary, the boy who has let his mind run wild and undisciplined will stand a better chance in the law school where his work will be systematized for him, and where he will be under the guidance of instructors, than in an office where he will have to rely on his own resources to a far greater degree. Such a boy has no business to study law anywhere, but least of all in an office

If you are sure that you are mature enough to keep up a strict course of study more or less by yourself, the first thing is to find a lawyer who will take enough interest in you to direct your work. It is too much to suppose that you will find one who can spare the time from his practice to give you the same attention that you would receive from the professors in a law school, but your road will be a hard one indeed if you fall upon a man who takes you in simply to secure your services free. For in these services lies the pit-fall most to be dreaded. From the first day you enter the office you will be able to make yourself useful in some way, if only by finding a book on the shelves. And as time goes on you will become accustomed to common procedure and will be interested with more and more important work. You will soon know more of practice than the average law school man ever knows on graduation, but the great danger is that you will be led to neglect your text books for the practical work. If you do you are lost. You may be admitted to the bar, but as has been said, you can never be anything but a

wooden, resourceless, machine-like lawyer, if you are ignorant of the theoretical side of your profession.

Do not decide to be a lawyer unless you can make the sacrifice necessary to be a good one. If you have an independent means of support that will enable you to pursue your studies tranquilly, and will carry you over the first years at the bar which usually bring in rather meagre recompense, your case is not such a difficult one. But if you must earn your living as you go along, the necessary sacrifice will be great, and you should face it squarely before you start out.

It is from this generation of young lawyers that the judges of the next generation will be chosen. In any community a corrupt bar will produce corrupt judges, and an ignorant bar will produce ignorant judges. The quality of the law depends ultimately on the competence and integrity of the practising lawyers, and whether you are destined to preside over the highest court, or to be a humble practitioner in the lowest, you should feel that the responsibility for meting out justice to your fellowmen rests upon your shoulders.—*The Green Bag.*

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The Butler of the Middle Temple.—H. W. Darling, Chief Butler of the Middle Temple, who has been presented by the Benchers with a check and rosebowl on the completion of fifty years' service, has described some of the duties of his picturesque office. For the past twenty-five years, since he was promoted to the chief butlership he alone of all the servants has had the privilege of remaining in the Benchers' dining hall at speech-time. "It is very necessary that the utmost privacy should prevail."

Robing the Benchers is another of Mr. Darling's duties, and he himself wears a black gown at dinner. "When King Edward was made a Bencher in 1861 I robed him," he said. "Sir William Alexander, who was standing at his side, asked him if I might do so, and the prince nodded smilingly. Many years afterwards I robed his eldest son, the Duke of Clarence. King Edward was present on that occasion, too. Among those who have passed through these halls in my time were Lord Chief Justice Cockburn, Lord Westbury, Mr. Montague Smith, Sir Henry Hawkins and Sir Lawrence Peel, who once was Chief Justice of India."

Another of Mr. Darling's duties is to see that the barristers and students dining in the outer hall are served with the exact quantity of wine (port and claret) the laws of the Temple allow. "It would be a terrible breach," he said, "if any one should have even half a bottle more than the allowance. For two shillings they can

have as much as they like to eat and as much beer as they choose to drink, but the wine is limited to one bottle of the best or two bottles of light. One 'grand night' the allowance is more liberal."—*The Green Bag.*

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THE PROFESSION.

"That clients may infer from thence,
How just is our profession,
The lamb sets forth our innocence,
The horse our expedition."

To which a poetic and dissatisfied suitor is said to have replied thus:—

" 'Tis all a trick, for these are shams
By which they mean to cheat you;
But have a care, for you're the lambs,
And they the wolves that eat you!
Nor let the thoughts of no delay
To these, their courts misguide you,
'Tis you're the showy horse, and they
The jockeys that will ride you!"

The Law Student's Journal.

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THE following extracts—which we take from *The Green Bag*—are stated to be from a little book by Mr. Fred. R. Barlee, called CASE-LAW VERSES; or *Memoria Technica* of Leading Cases:—

WITHDRAWAL OF OFFER BEFORE TIME GIVEN FOR ACCEPTANCE.

(Cooke *v.* Oxley, 3 T. R., 653).

A offered goods for sale to B,
B said, "You're very kind;
Give me till four o'clock to-day,
I can't make up my mind."
Meanwhile a chance of selling came,
which A *quite rightly* took.
As you may ascertain at will,
From *Oxley* sued by *Cooke*;
Had A the offer open kept,
He might have still been ruing it;
He wasn't bound, no *quid pro quo*
Was given him for doing it.

TRESPASS *AB INITIO.*

(The Six Carpenters' Case, 8 Coke, 146).

Ye carpenters six, ye were good at your trade,
In the Court it was found that your *case* was well made.
'Twas *plain* you intended the landlord to *chisel*
Yet his action for trespass went out with a fizzle
You were thankful, no doubt, so to you is the Law,
You gave it the *handle* for more than one *saw*.

NO CONTRIBUTION BETWEEN JOINT TORT-FEASORS.

(Merryweather v. Nixan, 8 T. R., 186).

In contract the Law has no wish to gainsay
 What between two defendants is called contribution,
So if one has the whole of the damage to pay,
 The other for *his* share must make restitution.
Merryweather v. *Nixan* declares that *in tort*
 The Law will not sanction a rule of this sort.

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In Aid of Discharged Convicts.—Mr. Winston Churchill has now formed a "Central Agency for the Aid of Discharged Convicts." The existing voluntary agencies for helping discharged convicts to recover an honest position in life are inadequate—they are hampered for want of funds, and they have no direct power of control over the discharged convict. Nor is the control exercised by the police, by means of the ticket-of-leave system, altogether satisfactory, for there is always a danger that police supervision, however carefully exercised, may prevent a man from obtaining employment. Mr. Churchill, therefore, proposes to federate the various voluntary agencies into one central body, upon which the Home Office will be strongly represented, and to assist this new agency with a State grant, which may be used for the maintenance and aid of discharged convicts. The new agency will combine a certain amount of authoritative supervision with that of voluntary societies, thus relieving the discharged convict of police supervision as long as he keeps straight. The scheme promises well, like many other schemes dealing with the criminal classes.—*The Law Notes.*

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Barrister's Education.—The Benchers of the Four Inns of Court have been trying to devise some means by which a barrister's education shall consist of something more practical than attending lectures and passing examinations.

The first body to take an actual step in this direction is Gray's Inn, and some interesting innovations are about to be introduced. The Benchers believe that every student should pass a period of "devilling" in chambers after he has been called. For obvious reasons it is difficult to make this compulsory, but the authorities at Gray's Inn have determined to encourage it by a practical method.

A sum of 200 guineas is to be set aside each year, and grants will be made from it to assist students who intend practising in England and are anxious to read in chambers. The first grants are to be awarded next Trinity term.

The second step which the Benchers have taken is a distinctly novel one, and will perhaps lay them open to criticism. They propose to give practical recognition to the Law Moots. or legal debates which are held from time to time in Hall. A master of the Moots has been appointed, and an advisory board, consisting of a bencher, a barrister, and a student, will act with him. In this way the Law Moot at Gray's Inn will be practically adopted as part of the legal curriculum, and we understand that in awarding grants for reading in chambers, the career of a student at the Law Moot will be taken into consideration —*The Law Notes.*

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The *Westminster Gazette* relates the following "*Incident in the Courts in* 1920!" Mr. Justice Withholding, in charging the Grand Jury, observed that no doubt they, in common with the members of the Bar, would have seen that three of his recent judgments had been reversed by the Court of Appeal. He wished to say no word that could hurt the members of that tribunal. Injury was far from his mind, which, indeed, was dominated at that moment by a profound sense of pity. The Grand Jury, nevertheless, would understand that these frequent reversals of his findings tended to throw doubt upon the soundness of his law and the equity of his decisions. He could not allow that to occur without a protest—a protest which he felt he owed to himself. His judgments had been reversed, it was true; but under what conditions? He was credibly informed that one of their Lordships responsible for this travesty of justice, this mockery of law had the previous night been seen at the Opera. It was easy to understand that a judge who spent his leisure in this way could not come to the consideration of cases in a true judicial frame of mind. Another of his learned brothers—in charity he would still speak of them as such—had notoriously supped of lobster, and had appeared on the bench after tossing on a bed haunted by nightmare.

Could it be alleged that he was in any condition either to understand the evidence or to appreciate the arguments of counsel? He might go on to other revelations, but out of respect for the judges in the higher Court he would refrain. He would only add, without reflecting in any degree upon other tribunals, that the one and only place for the clear interpretation of the law and the impartial administration of justice was the Court in which at any time he might sit, and it could be regarded as a national misfortune and a crying instance of stupidity that power had been given to any other body to review the work which he had always performed with a thoroughness and a discretion which he could never sufficiently appreciate.—*The Law Notes.*

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The rights of Pedestrians on Highways.—At the Grimsby Police Court last week, in a prosecution of a motorist for driving to the common danger, the defence raised was that the defendant lost his nerve, whereby he ran over an old man. The magistrate said that drivers of vehicles had no right to create crises in which their nerve failed them, and that a pedestrian has precedence over everyone on highway, and that if a person chose to ride or drive he must so order his going that no foot passenger was imperilled. The rights of foot passengers are perhaps put a little too high by the learned magistrate. They are free to use and cross the carriage way, and riders and drivers are bound to look out for them and to take reasonable care not to run over them, and there is a strong presumption against drivers who run down a foot passenger in broad daylight.—*Ibid.*

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HOUSE OF LORDS.

The Perjury Bill.—The Lord Chancellor said this Bill was the first of a series of Bills which he proposed to introduce for the purpose of the consolidation and codification of the criminal law of this country. This was a thing in itself very desirable, both for their own sakes at home and also because there had been from time to time a demand from the Colonies and Dependencies of the Crown for some statutory statement of what the criminal law of England really was, so that they might adapt it as far as they could. The Bill was read a second time in the last Parliament, and referred to a Joint Committee of both Houses, over which he had the honour to preside. The Committee met some eight or ten times, and they did their very best simply to reproduce the existing law, both statutory and common. That, he thought, they had succeeded in substance in doing. It was only right, however, to tell their Lordships that the Bill introduced a very slight alteration in the law, which arose from

the fact that there were scores, if not hundreds, of different Acts of Parliament which contained the laws relating to perjury and the punishment of it, and to false statements not on oath and the punishment of them, and these they had to be consolidated with the common law on the subject. It so happened that those who had drawn many of those Acts in the past never took the slightest trouble to see that the punishments for the same class of offence in one Act corresponded to the punishments for the same class of offence in the other Acts of Parliament, and if, therefore, they had absolutely reproduced the offences and the punishments for them as they appeared in the statutes they would have had an enormous schedule which would have shown not any very great diversity, but still diversity without any apparent reason and without any practical justification. The following paragraph in the report of the Committee summed up what they thought it was necessary to do:—'The Committee recognise that the amendments they have introduced in Clauses 5 and 6, for the purpose of making punishments more uniform and generalising the law so as to make it applicable to false statements under future as well as past Acts, go beyond codification and consolidation in the strict sense. But unless such a change be made, the Committee consider that it would hardly be worth while to attempt to codify the law at all, and they think it undesirable that so small an obstacle should prevent the realisation of so desirable an object; the more so as the alterations they are making are merely in the *maximum* punishments which may be inflicted and, generally, in the direction of decreasing them, and will in practice probably have little or no effect on the punishments actually awarded.' With that exception, and it was an exception absolutely necessary unless they were to introduce a large schedule which would make the Bill so cumbrous that it would be of no value to anybody, they had loyally attempted to reproduce the existing law.

Lord Alverstone congratulated the Lord Chancellor on the Bill and assured him, speaking for the Judges, barristers, and other practitioners that they were deeply indebted to him and the Committee. He need only mention, as indicating the extent of the Committee's labours, that the schedule repealed from 100 to 200 Acts of Parliament. A further illustration of the value of the Bill was afforded by the fact that under Clauses 5 and 6 alone the punishments under 20 Acts had been made uniform, whereas, previously, there was a discrepancy as to what the *maximum* sentence might be. It was very important to have such a law as that of perjury in as few clauses as possible. There was one other amendment of the law to which

the Lord Chancellor had not called attention. By Clause 1, sub-clause (6), it was provided that "the question whether a statement on which perjury is assigned was material is a question of law to be determined by the Court of Trial.' The question whether the materiality of a statement should be treated as a question of fact and left to the jury or should be decided as a matter of law had been a good deal discussed for many years. This Bill decided, rightly in his judgment, that materiality was a question of law.

The Bill was read a second time.—*February* 23:—*The Law Journal.*

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The Law Lords.—Mr. Rendal asked the Prime Minister whether his attention had been directed to the fact that on February 14, on the hearing of the case of *Smith* v. *The Lion Brewery Company*, the House of Lords was constituted of four Law Lords, and their Lordships being equally divided in opinion the decision of the lower Court stood, and the parties to the case were thus put to useless expense; and whether he would consider the desirability of legislation requiring the House of Lords to be constituted of an uneven number of Judges, so as to avoid the waste of the time of the Judges and the money of the public.

Mr. Asquith : I am informed by the Lord Chancellor that the effect of the equal division of opinion in the House of Lords in the case of *Smith* v. *The Lion Brewery Company* was that the decision of the Court of Appeal stood affirmed. Accordingly the parties were not put to any useless expense, for the decision was effective. It is a very rare occurrence for the House of Lords to be evenly divided in opinion—(cheers and laughter)—though it has occasionally occurred there as well as in other Courts, and it is not thought necessary to take any legislative step.—*March*, 1.—*Ibid.*

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Reminiscences of Sir Edward Clarke.—"I have been urged," Sir Edward Clarke has told a representative of the *Morning Post*, "to write a volume of reminiscences. Whether I shall ever do so is uncertain. I may tell you, however, that I have already partly written the story of my life, and I have promised my friend Mr. Reginald Smith, of Messrs. Smith, Elder, and Co., that if ever I complete it he shall have the option of publishing it. I am bound to say it is very doubtful whether I will ever do so as I am still very busy both with professional work and with work which I have lately undertaken in connection with Church matters".—*Ibid.*

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Compensation to acquitted prisoners.—Some amusement was caused at the last sitting of the Court of Criminal Appeal, (says the *Pall Mall Gazette*), by an appellant, who was then released from prison, asking if he was not to have compensation. But, after all, why not? In this particular case the conviction was not quashed, though the sentence was reduced, so that the court has not held that an innocent man has been imprisoned. But it often does so hold, and, sooner or later, Parliament must consider whether compensation ought not to be made in such cases. At present that kind of reparation is only made in sensational circumstances, but, surely, justice demands a general application of the principle—*The Law Journal.*

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Jurymen's difficulties.—A special juryman complained to Mr. Justice Scrutton, on February 24, that he had been "humbugged about." Jurors, he said, should receive more consideration. There was something wrong with the system, for he and several other gentlemen whom he saw beside him had been called to the courts and kept waiting, wasting valuable time. Mr. Justice Scrutton said an endeavour was made to call jurymen in the London area only once in two-and a half years. Every British subject had to take his share in this matter. If the jurymen were to remain in the courts they would see how difficult it was to regulate matters when it was not known how long cases would last. He would, however, ask about the matter. It was not the Judge who summoned jurors, but the Sheriff. It was the privilege of every British subject to meet with difficulties sometimes. *The Juror*—It is the privilege of a British subject to kick sometimes—*Ibid.*

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Photography and the Courts.—Since Lord Gorell, five years ago made his order, as President of the Divorce Court, prohibiting the practice of sketching in that court, the artist has practically been excluded from all the courts, but the 'snapshotter' has, strangely enough, been permitted to pursue his less ostentatious but more objectionable ways without any formal prohibition by the judges. The reproduction of portraits of the parties, witnesses, and jurymen in sensational trials has developed into a nuisance which threatens to impair the dignity and efficiency of the administration of the law. The jury in the Clapham murder case found it necessary to make a representation to Mr. Justice Darling on the nuisance, and the observations made by the learned judge after reading the jury's communication are worthy of prominence :—

This is an intimation from the jury in which they protest againt the continual snapshotting of members of the jury which is going on, and they point out that not

only is it a nuisance to them but it may be in some circumstance a source of danger to those who are engaged in the administration of justice. Judges, of course, must take their chances, but people who are brought from their homes to serve on Juries are not protected as Judges are. I think this is a most reasonable protest made on behalf of the Jury. This practice has become now far too common, although of recent introduction, and possibly this intimation, coming from the Jury themselves, may lead to some public regulation being issued on the subject. It will probably require legislative action, and I am by no means myself persuaded that the time has not arrived when that has become really necessary.

So far as the 'snapshotting' of jurymen and witnesses outside the courts is concerned, legislative action may be necessary; but to the extent to which the objectionable practice is followed in court, the judges themselves have the power to stop it immediately. Were they to make an order prohibiting the use of the camera in the courts, such as Lord Gorell made prohibiting the practice of sketching, any disobedience of the order, whether by a photographer who surreptitiously took a photograph, or by an editor who wilfully permitted its publication, would be punishable as contempt of court. It is obvious that, if the operations of the 'snapshotter' may be 'in some circumstance a source of danger to those engaged in the administration of justice,' the judges have ample power, if only they choose to exercise it, to protect them from the danger. Some occupants of the Bench have shown that they are conscious of the growing evil. 'Neither sketches nor photographs,' Mr. Justice Scrutton recently had occasion to say at the Central Criminal Court, should be taken in court and if, after what I say, any one makes a sketch or takes a photograph, there is such a place as Holloway.' What is required is some concerted action on the part of the High Court Judges by which they will make it definitely known that the vulgar enterprise of the 'snapshotting' journalist will no longer be tolerated in the courts over which they preside—*The Law Journal.*

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Cabinets of Lawyers.—MR. ASQUITH's Cabinet contains seven lawyers, six members of the Bar and one solicitor. In the new French Cabinet the legal element is even larger. M. Monis (Premier), M. Cruppi (Affaires etrangeres), M. Perrier (Justice), M. Paul-Boncour (Travail), M. Jules Pams (Agriculture), M. Dumont (Travaux publics, postes et telegraphes), M. Masse (Commerce), and M. Jules Steeg (Instruction publiqn et beaux-arts) are all members of the legal profession—*Ibid.*

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Lord Collins's Kind Acts.—'X. Y. Z.' writes :—'It is always pleasant to record kind acts, and the name of the late Lord Collins will go down to posterity as one of the kindliest of

our great lawyers. His Lordship's clerk (Mr. Davis) was attached to the late Lord during the whole of his distinguished career as barrister and judge—a period of upwards of 42 years. In addition to several marks of appreciation of his clerk's fidelity, his Lordship many years ago gave his clerk two sums of £1,000 each, several years intervening between these handsome gifts. His Lordship was evidently a believer in doing kindly acts during his lifetime and the words of Carlyle seem very appropriate, thus :—" I shall journey through this world but once ; any good thing therefore, that I can do, or any kindness that I can show to any human being, let me do it now. Let me not neglect it, nor defer it, for I shall not pass this way again." When presiding at the annual festival of the United Law Clerks' Society in 1897, his Lordship, in an eloquent appeal referred specially to the fidelity of Barristers' clerks, and added that " he knew of no relation, except that of husband and wife more close and intimate than that of Barrister and Clerk." I would only add that on being made a Lord of Appeal his Lordship retained the services of his clerk at a substantial salary, there being, unfortunately, no provision for the clerk when his chief is made a Lord of Appeal in Ordinary.'—*The Law Journal.*

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Age limit for Judges.—In connection with the recent revival of the familiar proposal that an age limit should be fixed for judicial service, it deserves to be re-called (says the *Globe*) that one of the finest compliments ever paid by one judge to another was received by an occupant of the Bench who was 82 years of age. The incident, which occurred in 1822, is duly recorded at the end of the report of *Jones* v. *Stevens* in II. 'Price's Exchequer Reports' : ' The Lord Chief Justice rose from his seat, and addressing Mr. Baron Wood, publicly congratulated the venerable judge on the unimpaired vigour of intellect and unabated learning which he had evinced that day in the discharge of his high duties. His Lordship then expressed the thanks of himself and his brothers to the learned Baron for the very effective and decisive part he had taken in the determination of the important questions raised by the objections which had been the subject-matter of the argument on this rule '—*Ibid.*

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Lawyers and Parliament.—The elevation of Mr. Haldane, the most experienced and learned of all the lawyers in the Cabinet, to the peerage, is a notable incident in the annals of the legal profession. Each of the two Houses has, for the first time in Parliamentary history, a lawyer for its leader, Mr. Asquith in the House of Commons and Viscount Haldane in the House of Lords. ' A well-trained lawyer,' said Sir Edward Clarke at the banquet given by the Bar to Mr. Asquith on his appointment as Prime Minister,

'may sometimes call himself a Radical, but he is never a revolutionist.' This saying, if it be true, is not without a peculiar significance at the present time. Nor does the fact that the House of Lords, as well as the House of Commons, is now led by a lawyer stand alone. The Speakers of both Houses belong to the legal profession, for Mr. Lowther, like Lord Loreburn, is a Bencher of the Inner Temple—*The Law Journal.*

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Lord Haldane as a Lord of Appeal.—Is Lord Haldane's elevation to the peerage to be followed by an alteration in the qualifications for judicial service in the House of Lords? The Prime Minister, in answer to a question put by Mr. Swift Mac Neill in the House of Commons on Wednesday, said he 'had every reason to hope that means would be found for taking advantage of the services his noble friend was willing to offer.' Lord Haldane is a lawyer of great accomplishments who, while he was at the Bar, enjoyed the leading practice in appeals to the House of Lords and the Judicial Committee. His assistance in the judicial work of the House of Lords would, therefore, be of exceptional value, and the community has every reason to be gratified that there is a prospect of this assistance being forthcoming.' Lord Haldane, though one of the most erudite and experienced of all the legal peers, is at present not competent to sit as a Lord of Appeal, because he has not, in the words of the Appellate Jurisdiction Act, 1876, held 'high judicial office.' Were he to be appointed a member of the Judicial Committee—a tribunal in which his services would be of special value—he would, by virtue of the same Act, be qualified to take part in the judicial work of the House of Lords. The occupants of two seats on the Judicial Committee may, under section 1 of the Act of 1833, be appointed by the King by sign-manual, but at present they are both occupied, one by Lord James of Hereford, the other by Syed Ameer Ali. One of two things is obvious. Either the Prime Minister has reason to know that one of these two occupants of the additional seats in the Judicial Committee intends to resign, or he contemplates the introduction of a Bill to so amend the Appellate Jurisdiction Act, 1876, as to enable a distinguished lawyer, such as Lord Haldane, to sit as a Lord of Appeal without having held 'high judicial office.' It is most important, of course, especially in view of possible changes in the constitution of the Upper Chamber, that the rule which prevents lay peers from taking part in the judicial work of the House of Lords should be strictly adhered to, and it would certainly not be conducive to its authority as the final Court of Appeal if every peer who happened to have had a legal training were made competent to take part in its deliberations. A change in the law which would enable the King to appoint a lawyer

of Lord Haldane's attainments a Lord of Appeal, even though he has never held a judicial office, would strengthen the tribunal without subjecting it to the risk of the intrusion of the lay element:—*The Law Journal.*

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Lord Haldane:—the new Law Lord.—Lord James of Hereford having resigned his seat on the Judicial Committee of the Privy Council, to which he was appointed fifteen years ago, Lord Haldane has been appointed to fill his place. This is one of the unpaid positions to which, under the Judicial Committee Act, 1833, appointments are made by the Sovereign by Sign-Manual, and Lord James of Hereford, one of the most widely esteemed of all the notable lawyers of modern times has earned the gratitude of the community by the regularity with which he has given his services gratuitously both in the Judicial work of the Privy Council and the House of Lords. By virtue of his appointment as a member of the Judicial Committee-a position which is a 'high judicial office' within the meaning of the Appellate Jurisdiction Act, 1876—Lord Haldane becomes a Lord of Appeal. It will not be an unprecedented thing for a Cabinet Minister to take part in the judicial work of the House of Lords. Lord James of Hereford not infrequently sat as a Law Lord whilst he was Chancellor of the Duchy of Lancaster. But if Lord Haldane's duties as Secretary for War leave him any leisure for judicial work, he is, perhaps, more likely to sit on the Judicial Committee than to serve as a Lord of Appeal. It was before the Judicial Committee that he displayed his best qualities as an advocate, and no living lawyer has manifested a keener interest in the constitution and jurisdiction of the Imperial Court of Appeal.--*Ibid.*

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Lord Haldane sat as a member of the Judicial Committee of the Privy Council for the first time on May 4.

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Lord Macnaghten.—A rumour has again been circulated that Lord Macnaghten is about to resign his office as a Lord of Appeal in Ordinary, which he has held with distinction for twenty-four years. We are glad to be in a position to state that the rumour—which has on this occasion been rather more circumstantial than usual—is entirely without foundation:—*The Law Journal.*

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Lawyers in the House of Lords.—One of the provisions of Lord Lansdowne's Bill for reforming the House of Lords has a special interest for the legal profession. He proposes that any peer who holds, or has held a high judicial office shall sit in the House of Lords during his life. There are sixteen peers at the present time

to whom such a provision would apply. In addition to Lord Loreburn and the four Lords of Appeal in Ordinary—Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Robson—there are Lord Halsbury, Lord Alverstone, Lord James of Hereford, Lord Lindley, Lord Coleridge, Lord Gorell, Lord Mersey and Lord Haldane among the English peers; Lord Ashbourne and Lord O'Brien among the Irish; and Lord Dunedin among the Scottish. Apart from these sixteen occupants or ex-occupants of the judicial office, the Law is not particularly well represented in the House of Lords. Lord Llandaff Cross, Lord Desart, Lord Rathmore, Lord Ludlow, Lord Dunboyne, Lord Lochee and Lord Hemphill are the only other peers who have practised at the Bar. Now that Lord Wolverhampton has passed away, the other branch of the profession is without a single representative in the Upper Chamber.—*The Law Journal.*

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"*Reading in Chambers.*"—Though nothing has yet been done towards carrying out the proposal made by the Bar Council three years ago that "reading in chambers" should become a compulsory part of every Bar student's training, the Benchers of the Inns of Court are showing an increasing appreciation of the practical part which 'pupilising,' as Lord Campbell called it, plays in the scheme of legal education. Early in the present year the Benchers of Gray's Inn resolved to set aside annually a sum of 200 guineas, from which grants are to be made to suitable students or newly-called barristers to enable them to read in the chambers of selected barristers. Now the Benchers of Lincoln's Inn have resolved, as one of their methods of celebrating the Coronation of King George, who was Treasurer of the Inns seven years ago, to adopt a similar scheme for the encouragement of the practice of 'reading in chambers.' An annual sum of 400 guineas is to be provided out of the funds of the Inn, the benefits of the scheme being confined to successful students at the Final Examination or barristers of less than two years' standing who intend to practise in the English courts. The endeavour of the Benchers of Gray's Inn and of Lincoln's Inn to develop the practical side of legal training is certainly to be commended, but it shows in striking fashion the lack of co-ordination in educational affairs in the Inns that the Benchers of the four Inns should act independently in so important a matter. Are the advantages to be enjoyed in Gray's Inn and Lincoln's Inn to be withheld from the students and newly-called baristers at the other two Inns? More and more the necessity for a central School of Law becomes evident, in connection with which practical training as well as scientific study could be organised on more systematic lines—*Ibid.*

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Lord Lansdowne's Bill.—Sir Robert Finlay, K.C., M.P., drafted Lord Lansdowne's Bill for the reform of the House of Lords, assisted by Mr. F. E. Smith, K.C., M.P., and Mr. Seymour Lloyd :—*The Law Journal.*

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Verdicts in Libel Actions.—Mr. Justice Scrutton, speaking at the annual dinner of the Newspaper Society, said that he thought that public opinion had been shocked by some of the verdicts that had been given recently in libel actions. He wished to say, and to say it carefully and cautiously, that there were juries as well as judges, and it was the juries who gave the verdict. When the law of fair comment was thoroughly established he thought that newspapers would occupy a better position than they did now. He always told juries, and he was happy to say they generally acted on what he told them, that an honest expression of opinion, although the jury disagreed with it, was fair comment which should be allowed, even though derogatory and disparaging to the person about whom it was made. If artists came before the people and asked for favourable notice in a newspaper they must not grumble if the newspaper gave an unfavourable notice. What was the value, say, of a notice in a newspaper that had always to be favourable with an eye on their advertising columns? If any value was to be attached to the notice in a newspaper it must be because they knew the newspaper was exercising an honest judgment, condemning where there was blame and praising where praise was due. That, as he understood it, was the doctrine of fair comment, which should be one of the articles of the Magna Charta of newspaper proprietors.—*Ibid.*

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Notification.—*Sea Customs Act* :—In exercise of the power conferred by section 23 of the Sea Customs Act, 1878 (VIII of 1878), and in supersession of the notification of the Government of India in the Finance and Commerce Department, No. 3838-S. R., dated the 26th June 1903, the Governor-General in Council is pleased to exempt all articles, other than those specified in the list hereto annexed, liable to duty under head 5, 6, 8. 9 or 10, as the case may be, of the Second Schedule to the Indian Tariff Act, 1894, (VIII of 1894), as amended by the Indian Tariff Act, 1894, Amedment Act, 1896 (III of 1896), from so much of the duty leviable thereunder on importation into British India as is in excess of a duty of 10 per cent *ad valorem*:—

List above referred to.

Main springs and Magazine springs.

Gun-stocks and Breech blocks.

Actions (including skeleton and waster.)

Breech bolts and their heads.

Cocking pieces.

Locks (for Muzzle-Loading arms).

Machines for making, loading, closing or capping cartridges for rifled arms.

BOOK REVIEWS.

Muhammadan Law of Inheritance : By M. M. ISHFAK, B. L., 1st Vol. (1910): Messrs. R. Cambray & Co., Calcutta:—We heartily welcome this handy volume on Mahomaden Law. The Mahomedan Law has been rarely well understood by the average lawyer here, more perhaps on account of the small number of Mahomedan Law cases in these Provinces than on account of other reasons; and when questions of Mahomedan Law really crop up for decision in courts, we have very often found both the Bar and the Bench at sea. In such a state of things we cannot but really welcome any good effort in the way of making that branch of law within the easy reach and understanding of the average law student and the average practitioner. The book under review is a useful addition to the existing books. It contains the original texts and translations and it explains and elucidates intricate points relating to the shares. A chart has been added from which one can easily find out the shares alloted to the heirs. The whole matter has been well arranged and the book has been neatly got up. We commend the book to the Profession as well as to students of law as a handy book containing a neat presentation of a subject commonly taken to be difficult and in consequence generally avoided.

A Digest of Cases Overruled : By BIDYUT GANGOLY, *Bar-at-law*, and Advocate, High Court, Calcutta: Published by The Law Book Society, Calcutta, Price Rs. 7.—The Profession has long been in need of a succinct list of overruled cases which will enable the practitioner to avoid the serious mistake of citing an overruled case to the court. Very often, it happens that a case is handed to a practitioner while on his legs by somebody else at the spur of the moment as an authority for a plausible argument; and sometimes it happens that overruled cases are so handed up by mistake. This book will enable many a practitioner to avoid such mistakes and we are sure that the Profession will welcome it. The cases dealt with are arranged in alphabetical order and an exhaustive subject index is found at the end of the

book. There are two tables, one containing the names of cases overruled and the other containing the names of overruling cases. We hope the author will in future editions increase the usefulness of the book by giving two corresponding tables containing the references to cases in the order of the volumes of the reports and the pages therein. We commend this book to the Profession.

A Practical Guide to the Death Duties: By CHARLES BEATTY, Solicitor of the Estate Duty Office, Somerset House: Published by Effingham Wilson, 54, Threadneedle Street, E. C., 3rd Edn. (1911): Price 4*s*. net.—The subject of death duties has become increasingly important to the tax-payer and the practitioner in Great Britain and this third edition of a practical guide relating to death duties and preparation of death duty accounts cannot but be highly useful both to the Profession and the tax-payer, especially after the important changes effected by the Finance Act of 1910.

The Declaration of London by NORMAN BENTWICH, *Bar-at-law*: Published by Messrs. Sweet and Maxwell, Ltd., 3, Chancery Lane, London, W C. Price 5*s*. net.—This is a commentary on what is called the Declaration of London, which lays down the generally recognized principles of international law in respect of international naval matters. The declaration is the outcome of the London Naval Conference called together by His Majesty's Goverment in December 1908. The document itself is a very complex document not easily understood by the layman. This commentary on the Declaration explains in a very lucid manner the contents of the document in whole and in detail, and we are sure it cannot but be immensely useful to those who have to do with it.

Confessions and the Evidence of Accomplices: By P. N. CHAUDRI, B. L., 2nd Edn. (1910): Price Rs. 4.—The Law of Confessions, though contained in a few sections of the Evidence Act and the Code of Criminal Procedure, is yet in need of being thoroughly well understood both by the Police and the Magistracy of the land, and this second edition of Mr. Chaudri's book, bringing as it does the whole law on the subject up to date in a handy and useful form, will be really welcome to them. We congratulate Mr. Chaudri on his bringing out the second edition of his book and we wish him every success.

The Law of Sedition and Cognate Offences: By W.R. DONOGH M. A.: Published by Messrs. Thacker Spink & Co., Calcutta. Price Rs. 7-8-0.—The Law of Sedition has assumed so much importance of late in this country that we can assure the learned author that no apology was really needed from him for the production of this neat and handy volume. The author's aim has been to provide a comprehensive treatise on the law of sedition for the use of both the lawyer and the layman; and we can say he has thoroughly well succeeded in his attempt. The book is sure to be found useful by the Press, the Profession and the Bench in that it embodies the whole law of sedition in a convenient and yet handy form. The get-up is neat and leaves nothing to be desired.

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We beg to acknowledge receipt of the following publications :—

A Digest of Cases Overruled : By Bidyut Gangoly, Barrister-at-Law, Advocate High Court, Calcutta.

Limitation Act : By Mr. Starling, Fifth Edition (1911).

The Law of Illegitimacy · By W. Hooper, Solicitor, London. Messrs. Sweet and Maxwell Limited, London. Price 12*s*. 6*d*.

Muhammadan Jurisprudence : By Abdur Rahim, M. A., Barrister-at-Law' Judge, High Court, Madras.

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